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No. 93-996

In the Supreme Court of the United States

OCTOBER TERM, 1993

IN RE JAMES R. HOLLOWAY, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in reviewing the sufficiency of the evidence supporting petitioner's conviction for criminal contempt, the court of appeals properly considered both the certificate of contempt and portions of the trial record in concluding that petitioner's disobedience of court orders was willful.

2. Whether petitioner was properly held in contempt of court under the summary contempt procedures of Fed. R. Crim. P. 42(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 995 F.2d 1080.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1993. A petition for rehearing was denied on September 24, 1993. Pet. App. 47a-48a. The petition for a writ of certiorari was filed on December 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 8, 1991, petitioner was held in criminal contempt of court during a trial in the United States District Court for the District of Columbia. The district court issued a written order and certificate of contempt pursuant to Fed. R. Crim. P. 42(a) that same day. On March 10, 1992, the court sentenced petitioner to pay a $1,000 fine. Pet. App. 2a. The court of appeals affirmed. Pet. App. 1a-46a.

1. Petitioner is an assistant federal public defender. He represented Kelvin Rascoe, who was one of six co-defendants in a prosecution for drug offenses that was tried before Judge Norma Holloway Johnson. During petitioner's direct examination of Officer Darrell Young in the presentation of the defense case, Young testified that he prepared an arrest form (known as a "PD 163") for Rascoe that included a statement of the facts relating to Rascoe's arrest and that said that Rascoe had possessed cocaine base with the intent to distribute it. Young corroborated the earlier testimony of Officer Edward Truesdale, who had stated that, in writing the statement of facts in the PD 163, Young had relied on information provided to him by Truesdale, who was present at the arrest, and Officer Robert Condit. Young also confirmed that he had not witnessed any of the events recited in the PD 163. Pet. App. 2a, 4a-5a.

Petitioner then asked Young a series of questions about the information that was included in the PD 163. Following an objection, the district court ruled the inquiry impermissible because Young had no personal knowledge of any of the information contained in the statement of facts. In response to a subsequent question, Young confirmed the court's understanding by testifying that "I don't have any personal knowledge of

the crime being committed." Pet. App. 4a; 10/8/91 Tr. 70-78.

Immediately after that colloquy, petitioner asked the court for permission to mark for identification a "*Gerstein* affidavit"[1] that was contained in the court's own case files, and that had been sworn by Officer Condit the day after Young completed the PD 163. Petitioner told the court that he wanted Young to compare the *Gerstein* affidavit to the PD 163 and to offer an opinion on whether Condit merely copied the statement of facts from the PD 163 in creating the *Gerstein* affidavit. The court ruled that such testimony was "totally irrelevant." Pet. App. 5a, 17a-18a.

Petitioner argued that he was laying the foundation for a later examination of Condit regarding the source of information for Condit's *Gerstein* affidavit.[2] Pet. App. 18a. The court told petitioner that he must first establish that Young had previously seen the *Gerstein* affidavit. *Id.* at 18a-19a. Petitioner asked the court whether

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[1] A *Gerstein* affidavit is a sworn statement that establishes probable cause to justify restraint after an arrest. See *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

[2] In an earlier ruling, the court barred petitioner from attempting to impeach Truesdale with the contents of Young's PD 163, because Truesdale testified that he had never seen that document before. Pet. App. 5a; 9/30/91 Tr. 49-50. Truesdale had testified that during the execution of a search warrant on a home in northeast Washington, D.C., he saw Rascoe tossing ziplock bags containing white rocks into the air and onto the floor. Pet. App. 5a; 9/30/91 Tr. 21-24, 45-46. In response to petitioner's questions, Truesdale confirmed that the PD 163 Truesdale had prepared on the arrest of a co-defendant did not mention that Truesdale had seen Rascoe tossing the ziplock bags into the air. Pet. App. 5a; 9/30/91 Tr. 55-56. Truesdale stated, however, that he put only "some of the facts" into the co-defendant's PD 163. See 9/30/91 Tr. 51-52.

he could "ask [Young] to compare the two documents," to which the court replied that he could not. *Id.* at 20a. When petitioner asked the court to explain why his question was improper, the court stated that "[i]f this man has never seen that document [the *Gerstein* affidavit] before—and that's why I told you you must ask him if he has seen that document, not just those paragraphs contained on it—then he can't testify to it." *Ibid.* Petitioner asked: "Well, can he look at it now? I mean, can he look at it now and compare it." *Ibid.* The court responded that Young "may not compare it until you have made certain determinations," *i.e.*, whether Young had seen the document before. *Id.* at 20a-21a.

Petitioner proceeded to question Young about the *Gerstein* affidavit, asking Young "Do you know what that document is?" The court interrupted, telling petitioner, "First of all, we must determine if he's ever seen it before." The judge herself asked Young if he had ever seen the affidavit before. After Young said no, the court reminded petitioner of its prior ruling about laying a foundation before questioning Young about the affidavit. Pet. App. 7a, 21a-22a.

Nonetheless, petitioner once again asked Young if he knew what the *Gerstein* affidavit was. The court intervened as before, instructing petitioner, "[i]f he has never seen it before, we are not going to ask him if he knows what it is." Petitioner then asked Young if he had "seen [the document] now? Have you looked at it just now?" When Young said yes, petitioner reiterated his earlier question, "can you now tell us what * * * that document is?". The court sustained the government's objection and warned petitioner that "this is the last time I'm going to tell you the objection is sustained." Petitioner persisted in his inquiry, however, asking Young, "Do you recognize any of the wording set forth in that

document?" Following the government's objection, the district court called petitioner to the bench and held him in summary contempt. Pet. App. 7a, 22a-23a.

Later that day, the court issued a written order and certificate of contempt pursuant to Fed. R. Crim. P. 42(a). Pet. App. 49a-63a. The contempt certificate stated that petitioner had defied "the Court's explicit order not to pursue a particular line of questioning," by "contumaciously persist[ing] in posing questions which the Court had already ruled impermissible." *Id.* at 52a. The court found that the "contempt caused serious and substantial interference and delay in the proceedings * * * and [an] obstruction to the orderly administration of justice."[3] *Ibid.* The court scheduled sentencing to take place following the conclusion of trial. *Id.* at 49a.

On March 10, 1992, after a continuance at petitioner's request, the district court sentenced petitioner to pay a fine of $1,000. The court denied petitioner's motion to vacate the contempt conviction and gave petitioner and his counsel the opportunity to allocute on petitioner's behalf. Pet. App. 2a; Gov't C.A. Br. 21-22.

2. The court of appeals affirmed. The court found the evidence sufficient to sustain petitioner's contempt conviction under 18 U.S.C. 401(3), for "[d]isobedience or resistance to [a court's] lawful writ, process, order, rule, decree, or command." The court first rejected petitioner's claim that the terms of the district court's ruling regarding the permissible scope of questioning on the *Gerstein* affidavit were unclear, finding that the district court judge "had made herself as clear as language permits." Pet. App. 7a. The court noted that petitioner's

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[3] The contempt certificate attached the portion of the trial transcript in which petitioner's contempt had occurred. Pet. App. 50a, 53a-62a.

question whether Young had seen the affidavit "now" established that he understood the court's rulings. *Id.* at 8a.

The court of appeals also concluded that petitioner disobeyed the district court's orders "with culpable intent." Pet. App. 9a. The court stated that petitioner's conduct in the episode for which he was cited for contempt, by itself, "points strongly in the direction of willfulness."[4] *Ibid.* The court found, however, that it did not have to rely on that instance alone, because other instances during the trial in which petitioner had been warned not to defy court orders "render the conclusion that he acted with culpable intent almost inescapable."[5] Pet. App. 9a-12a.

The court of appeals also upheld the district court's use of the summary contempt procedures of Fed. R. Crim. P. 42(a), rather than the notice and hearing procedures of Rule 42(b).[6] The court noted that the district

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[4] The court of appeals explained that petitioner had engaged in a "devious pretense" that he could examine Young based on Condit's *Gerstein* affidavit if Young had seen it in court that day; as the court of appeals explained, that view "would make Judge Johnson's ruling [that Young could not be examined on the document unless he had seen it before] completely meaningless." Pet. App. 9a. Judge Johnson had specifically rejected petitioner's request to have Young examine the document for the first time in court, and compare it to his PD 163. *Id.* at 20a-21a.

[5] The court of appeals reviewed two instances in which petitioner disobeyed the trial court's rulings regarding appropriate questions and one colloquy in which the judge warned petitioner that he would be expected to comply with her orders on pain of contempt. Pet. App. 9a-12a.

[6] The court noted that the district court's determination that summary contempt is necessary to maintain order in the courtroom is reviewed "very deferentially—for abuse of discretion." Pet. App. 13a.

court had repeatedly warned petitioner that "certain lines of questioning were impermissible and also that failure to comply with orders could lead to contempt," yet "[n]one of this worked." Pet. App. 13a. Even in the colloquy that preceded the contempt citation, the court of appeals observed, the district judge had repeatedly attempted to elicit compliance from petitioner by reiterating her rulings and warning petitioner that "his continued inquiries violated the order." *Ibid.* Summary contempt was therefore necessary "to terminate the improper questioning of Young, to deter future intentional violations of her orders, and to vindicate judicial authority to control the courtroom."[7] *Ibid.* Finally, the court of appeals upheld the $1,000 fine. *Id.* at 14a-16a.

Chief Judge Mikva dissented. He concluded that the district court erred in employing summary contempt because petitioner's conduct did not actually obstruct justice. He also argued that the district court's instructions were not sufficiently clear to demonstrate willfulness on petitioner's part in pursuing his line of questioning of Young. In addition, he concluded that the majority should not have relied on conduct that was not mentioned in the contempt certificate to support the finding of contumacious intent, because, in his view, a contempt conviction must rest on the cited conduct alone and, in any event, the other incidents did not justify summary contempt. Pet. App. 27a-46a.

ARGUMENT

1. Petitioner contends (Pet. 7-14) that, in reviewing the sufficiency of the evidence that he acted with culpa-

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[7] The court of appeals also held that the judge was not required to refer the matter to another judge because the misconduct was not of a "personal nature" and the judge had not adopted an "adversary posture" with respect to petitioner. Pet. App. 14a.

ble intent, the court of appeals erroneously relied upon incidents not cited in the district court's contempt certificate. That claim lacks merit.

To constitute a criminal contempt based on disobedience of a court order in violation of 18 U.S.C. 401(3), the contemnor must have willfully violated a clear and reasonably specific order of the court. *United States* v. *NYNEX Corp.*, 8 F.3d 52, 54 (D.C. Cir. 1993). When the trial judge adjudicates the contempt summarily, "[t]he order of contempt shall recite the facts" constituting the contempt. Fed. R. Crim. P. 42(a); see *United States* v. *Schrimsher*, 493 F.2d 842, 845 (5th Cir. 1974); *Tauber* v. *Gordon*, 350 F.2d 843, 845 (3d Cir. 1965) (en banc) (per curiam). If the cited conduct is not contumacious, a reviewing court cannot uphold an order of contempt based on other, uncited conduct in which the contemnor engaged during the trial. See *Eaton* v. *City of Tulsa*, 415 U.S. 697, 698-699 (1974) (per curiam). The court of appeals recognized that principle, see Pet. App. 3a ("the reviewing court may not affirm if the *cited* conduct has not been contumacious"). Petitioner, however, does not claim that the court of appeals upheld his contempt conviction based on the theory that he could have been held in contempt for other, uncited conduct. Rather, petitioner claims that the court of appeals erred in considering uncited episodes during the trial in concluding that the contempt for which petitioner was cited—his disobedience of a specific court order—was committed willfully.

The courts of appeals, however, have routinely considered the entire trial record, not just the contempt certificate alone, in evaluating whether a contemnor's actions were willful or intentional. See, *e.g.*, *United States* v. *Lumumba*, 794 F.2d 806, 810, 811 (2d Cir.), cert. denied, 479 U.S. 855 (1986) ("a court can nevertheless look at the cited conduct in the context of other closely

related behavior in the case to determine if that conduct is in fact contumacious"; conducting an independent "reading of the transcript" to locate evidence of contemnor's intent to disrupt the trial); *Vaughn* v. *City of Flint*, 752 F.2d 1160, 1169 (6th Cir. 1985) (relying on the "total record" in "refut[ing] any inference of a deliberate and intentional effort to show disrespect for the court or to obstruct its proceedings"); *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973) (reversing summary contempt conviction for lawyer's tardiness, because "there is no evidence that [the lawyer] was repeatedly unpunctual").[8]

For the court of appeals to consider other instances of conduct before the district judge in evaluating the issue of intent neither violates the due process rights of the contemnor nor amounts to the presentation of new evidence on appeal. See Pet. 11. Rather, it is similar to the review of any conviction with regard to the issue of intent: while the charging instrument must allege the conduct constituting the crime, it need not recite all of the evidence bearing on intent. The sufficiency of the evidence of intent to commit contempt turns, as it does

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[8] As petitioner notes (Pet. 12-13), the court of appeals upheld the contempt conviction in *United States* v. *Lumumba* after a hearing pursuant to Fed. R. Crim. P. 42(b). But the principle for which petitioner contends is that all of the evidence supporting a finding of willfulness must be included in the contempt certificate in order for that document to specify the conduct constituting the contempt. If the court of appeals in *Lumumba* had accepted that principle, it would not have reviewed uncited conduct as bearing on intent, regardless of the procedural posture of the case. Petitioner also suggests (Pet. 13) that the court in *In re Farquhar* was expressing a requirement that the trial judge specifically recite the other evidence supporting the contempt; the *Farquhar* court, however, seems to have conducted its own review of the record for the requisite evidence. 492 F.2d at 564.

with respect to any conviction, on the full record available to the trier of fact. The court of appeals' reference to other episodes that took place during the trial in addressing the question of petitioner's intent was consistent with the requirement of Rule 42(a) that the specific facts of the contempt be recited in the contempt certificate and order.[9]

Petitioner errs (Pet. 10-11) in contending that the decision in this case conflicts with *Eaton* v. *City of Tulsa*, *supra*. In *Eaton*, this Court reversed a defendant's contempt conviction for using street vernacular in court on one occasion. 415 U.S. at 698-670. The Court also held that the state appellate court had erred in concluding that other examples of "discourteous responses," not considered by the trial court, could be invoked to uphold the conviction. *Id.* at 698. The Court explained that the appellate court had denied the defendant due process by affirming the conviction "upon a charge not made." *Id.* at 699. Here, however, the court of appeals did not review

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[9] In any event, the particular episode for which petitioner was cited was itself sufficient to establish that his violation of the court's order was willful. For "[w]hile a lawyer has the right and duty to argue vigorously all points that he believes are properly advanced on behalf of his client, he must obey a direct order of the court, * * * no matter how arbitrary he may believe it to be." *United States* v. *Lumumba*, 794 F.2d at 810. Petitioner clearly and deliberately violated that rule by repeatedly posing questions that the trial court had ruled out of bounds. As the court of appeals stated, petitioner's actions at the time of the cited conduct "point[ ] strongly in the direction of willfulness," Pet. App. 9a, and they are sufficient to support his conviction. See *United States* v. *Maynard*, 933 F.2d 918, 920 (11th Cir. 1991) (sufficiency standard for reviewing a contempt conviction is whether a reasonable trier of fact, construing the contemnor's actions in the light most favorable to the government, could find the defendant guilty beyond a reasonable doubt).

the record for other instances of conduct that might constitute contempt and convict him on "a charge not made." The conviction was affirmed only because the conduct for which the trial court held petitioner in contempt—petitioner's disobedience of the court's rulings on the scope of the examination of Young—was, in fact, contemptuous.

Nor is petitioner correct in asserting (Pet. 10-11) that the decision in this case conflicts with decisions of other courts of appeals. In *Tauber* v. *Gordon*, *supra*, the Third Circuit reversed "a contempt conviction[] based on one specification of conduct that, on review, appears not to have been contemptuous, and a generalized reference without specification to a course of conduct throughout [the] trial." 350 F.2d at 845 n.1. *Tauber* held only that a contempt conviction must "stand or fall on the sufficiency of the specification of wrongdoing upon which it is based." *Ibid.* The court, however, had no occasion to consider the issue presented in this case: whether, when the trial court sufficiently specifies the contemptuous wrongdoing, the appellate court may consider the entire trial record in determining whether the contemnor acted willfully.

Petitioner also suggests (Pet. 10-11) that other cases following the rule of *Eaton* and *Tauber* conflict with the decision in this case. Presumably, petitioner is referring to the cases he cites for the proposition that the facts stated in the certificate of contempt are important. Pet. 9. Those cases, however, did not consider the element of intent; they simply reiterated the requirement that the conduct constituting the contempt must be alleged with specificity. See *United States* v. *Marshall*, 451 F.2d 372, 376 (9th Cir. 1971) (contempt specification deficient because it did not identify the contumacious conduct, but made only "conclusory statements, unsup-

ported by specific references to the record"); *United States* v. *Schrimsher*, 493 F.2d at 845 ("the order [of contempt] does not make clear exactly which of [the attorney's] remarks the court considered contemptuous").[10]

2. Petitioner argues (Pet. 14-19) that the court below erred in upholding his conviction under the summary contempt procedures of Fed. R. Crim. P. 42(a) rather than affording him a hearing under Rule 42(b).

a. Rule 42(a) provides that a criminal contempt "may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Petitioner does not dispute that the judge saw and heard the behavior at issue here and that it was committed in the court's presence. Instead, he argues that the court of appeals "failed to determine whether petitioner actually obstructed the administration of justice," Pet. 14-15, which petitioner asserts is a prerequisite to the use of summary contempt procedures.

The district court found that petitioner's contempt "caused serious and substantial interference and delay in the proceedings * * * and obstruction to the orderly

[10] Petitioner also asserts (Pet. 13 n.5) that *In re Chaplain*, 621 F.2d 1272, 1276 (4th Cir.) (en banc), cert. denied, 449 U.S. 834 (1980), "increases the divergence in the courts of appeals on this issue." He does not claim, however, that *Chaplain* conflicts with the decision here, or that the court of appeals in this case applied the principle endorsed by *Chaplain*. See *Chaplain*, 621 F.2d at 1276 ("where the record reveals a pattern of potentially disruptive conduct preceding a summary conviction, the specification of a single episode [in the contempt order] adequately charges as well the entire course of like antecedent conduct from the time when it was fairly identified to the contemnor as potentially contumacious"). Because *Chaplain* contains no holding on what evidence of *intent* a reviewing court may consider, it is irrelevant to the issue presented here.

administration of justice." Pet. App. 52a. The determination whether to impose summary contempt penalties under Rule 42(a) rests in the discretion of the district court, see *United States* v. *Wilson*, 421 U.S. 309, 316-317 (1975); *In re McDonald*, 819 F.2d 1020, 1024 (11th Cir. 1987) (per curiam); *United States* v. *Moschiano*, 695 F.2d 236, 251-252 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983), and the trial court was within its discretion in finding petitioner's disobedience of the court's ruling to constitute an "actual obstruction of justice." Petitioner ignored the court's authority in front of the jury, delayed the progress of trial by repeatedly asking questions already held improper, and forced the court to engage in repetitious instructions and explanations about petitioner's examination of Young.

Because the district court did not specify which subsection of 18 U.S.C. 401 covered petitioner's contempt, the court of appeals considered that issue as a threshold matter. It concluded that petitioner's conviction was "valid" under 18 U.S.C. 401(3), which covers "[d]isobedience or resistance to [a court's] lawful writ, process, order, rule, decree, or command." Pet. App. 3a. The court therefore stated (*ibid.*) that it "need not address" in this case the applicability of 18 U.S.C. 401(1), which covers "[m]isbehavior of any person in [the court's] presence or so near thereto as to obstruct the administration of justice." In a footnote, the court added that certain cases cited by the dissent, "insofar as they clarify the meaning of the obstruction of justice element of § 401(1), [are] not pertinent to this opinion." Pet. App. 3a n.1.

Based on that footnote, petitioner contends (Pet. 15) that in affirming the district court's use of summary procedures under Fed. R. Crim. P. 42(a), the court of appeals "ignored the question whether petitioner's conduct

obstructed justice." The question whether petitioner's conduct must have obstructed justice to violate 18 U.S.C. 401(3), however, is distinct from the question whether obstruction of justice must be established to justify the use of summary contempt procedures under Rule 42(a). The court of appeals addressed the propriety of invoking the summary procedures of Rule 42(a) in this case in a separate section of its opinion. Pet. App. 12a-14a. In that section, the court began by quoting this Court's statement in *Taylor* v. *Hayes*, 418 U.S. 488, 497 (1974), that when a judge observes a contempt committed in his presence, he has the power to punish it summarily "for the purpose of maintaining order in the courtroom."[11] Pet. App. 13a. On the facts of this case, the court held that the need to maintain order in the courtroom was present:

> Judge Johnson unquestionably was on solid ground in determining that the necessity of preserving order justified use of Rule 42(a). By the time the judge actually held [petitioner] in contempt, she had repeatedly warned him—without any apparent effect—to heed her rulings on pain of potential contempt. In the line of questioning that produced the contempt conviction, she at least three times reiterated her order about the threshold showing required to inquire about the *Gerstein* affidavit, and warned [petitioner] in open court that his continued inquiries violated the order. *By the time Judge Johnson moved under Rule 42(a), she had a compelling need to terminate the improper questioning of Young, to deter future*

[11] The court of appeals also recognized that "only [t]he least possible power adequate to the end proposed should be used in contempt cases." Pet. App. 13a, quoting *United States* v. *Wilson*, 421 U.S. 309, 319 (1975) (internal quotation marks omitted).

intentional violations of her orders, and to vindicate judicial authority to control the courtroom.

Pet. App. 13a. (emphasis added).

That discussion indicates that the court of appeals held that summary contempt was warranted here because petitioner's conduct constituted an actual disruption of judicial proceedings. The court determined that the vindication of the district court's authority and the orderly continuation of the trial required immediate action. That is the essence of the requirement that summary contempt not be imposed absent "an actual obstruction of justice." *In re McConnell*, 370 U.S. 230, 234 (1962); *Ex parte Hudgings*, 249 U.S. 378, 383 (1919); *Ex parte Terry*, 128 U.S. 289, 303, 307 (1888); see *Wilson*, 421 U.S. at 316 (footnote omitted) ("The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court.").

Petitioner contends (Pet. 15) that the court of appeals' decision conflicts with decisions of this and other courts.[12] That claim is premised on the view that the court of appeals did not require any showing of interference with or obstruction of judicial proceedings as a prerequisite to upholding the use of summary contempt. Because the court of appeals found such an interference or obstruction in this case, petitioner's claim of a con-

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[12] See Pet. 15, citing, *inter alia*, *In re McConnell*, *supra*; *Taberer* v. *Armstrong World Industries, Inc.*, 954 F.2d 888, 900-901 (3d Cir. 1992); *United States* v. *Turner*, 812 F.2d 1552, 1568 (11th Cir. 1987); *Vaughn* v. *City of Flint*, 752 F.2d at 1166; *Gordon* v. *United States*, 592 F.2d 1215, 1217 (1st Cir.), cert. denied, 441 U.S. 912 (1979).

flict with decisions that have required a showing of interference with or obstruction of judicial proceedings does not call for this Court's review.

b. Petitioner also argues (Pet. 16-19) that the district court improperly employed the summary procedures of Rule 42(a) when it did not sentence petitioner until five months after it held him in contempt.

The district court issued a written order and certificate of contempt on the same day it cited petitioner for contempt. Although the court did not sentence petitioner until after the trial, the adjudication of contempt occurred immediately. That immediate adjudication fulfilled the goals of summary punishment, because it vindicated the court's authority, protected the processes of orderly trial, and ensured that petitioner understood his obligation to comply with court orders in further proceedings. As the court of appeals found, the necessity of preserving courtroom order justified the use of Rule 42(a) here.[13] Pet. App. 13a-14a.

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[13] Amici Public Defender Service, et al., argue (Br. 6-11) that the deferral of sentencing might have impaired the vigor of petitioner's defense of his client, because of the lawyer's fear of the sentence to be imposed at the end of the trial. Amici thus suggest that deferral creates an impermissible conflict of interest between the defendant and his lawyer. But if sentence had been imposed immediately, the attorney would, if anything, have suffered a greater "chill" by receiving the full sting of his punishment. Moreover, the trial judge always retains the power to reduce a contempt sentence after the trial. See *Groppi* v. *Leslie*, 404 U.S. 496, 506 n.11 (1972) ("Modification of contempt penalties is common where the contemnor apologizes or presents matter in mitigation."). If amici's claim of a "conflict of interest" were accepted, any defense counsel who was held in summary contempt could be said to labor under a conflict, on the theory that he would become a less vigorous advocate in the hope of reducing his own punishment for contempt.

Contrary to petitioner's contention (Pet. 17-19), the court of appeals' holding does not conflict with *Taylor* v. *Hayes*, 418 U.S. 488 (1974), or *United States* v. *Lumumba*, 741 F.2d 12 (2d Cir. 1984). In those cases, the trial judge deferred both sentencing *and* final adjudication of the contempt charge until after trial. *Taylor*, 418 U.S. at 498-499; *Lumumba*, 741 F.2d at 17; see *United States* v. *Lumumba*, 794 F.2d at 808. Here, in contrast, the adjudication of contempt was immediate, and only sentencing was delayed. Because the immediate adjudication of contempt vindicated the court's authority and enabled the court to proceed with the trial, the reasons that the deferred adjudication of summary contempt troubled the courts in *Taylor* and *Lumumba* are not present in this case.[14]

[14] Petitioner also relies on (Pet. 17) the decisions in *United States* v. *Stratton*, 779 F.2d 820, 836 (2d Cir. 1985) (upholding a short delay in the imposition of a contempt sentence), and *United States* v. *Dowdy*, 960 F.2d 78, 82 (8th Cir. 1992) (upholding the suspension of execution of a contempt sentence until after trial). Both of those decisions upheld the use of summary contempt, and neither conflicts with the decision in this case. See also *In re McDonald*, 819 F.2d at 1025 (upholding summary adjudication of contempt, where court delayed imposition of punishment until after jury returned its verdict; "especially where the offender is an attorney representing a client on trial, summary punishment may be postponed until the conclusion of the proceedings").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1994

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No. 93-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE JAMES R. HOLLOWAY,
Petitioner

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF AMICUS CURIAE FOR THE PUBLIC DEFENDER SERVICE AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

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IN THE
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No. 93-996

IN RE JAMES R. HOLLOWAY,
Petitioner

On Petition for a Writ of Certiorari
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for the District of Columbia Circuit

BRIEF AMICUS CURIAE FOR THE PUBLIC DEFENDER SERVICE AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE[1]

The Public Defender Service (PDS) for the District of Columbia was established by Congress to provide representation to indigent persons accused of crimes in the local and federal courts of the District of Columbia. D.C. Code §§ 1-2701-2708. The National Legal Aid and Defender Association (NLADA) is a private, non-profit membership

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[1] Letters of consent, pursuant to Rule 37.2, have been filed with the Clerk.

organization based in Washington, D.C. Its purpose is to assure the availability of quality legal services in criminal and civil cases to persons financially unable to retain counsel. The membership of NLADA includes most public defender offices around the country, as well as many assigned defense counsel. Both PDS and NLADA have an interest in maintaining high standards for zealous, effective, and ethical advocacy by lawyers for indigent criminal defendants. PDS and NLADA have participated as *amici* in other proceedings before this Court, including a joint Brief filed last Term in *United States v. Lowell Green*, No. 91-1521. PDS also represented the Respondents last Term in *United States v. Dixon*, 113 S.Ct. 2849 (1993), a case involving the special attributes of criminal contempt. *Amici* submit that the summary contempt procedure followed here needlessly pits lawyer against client and may have a significant and undesirable chilling effect on the representation of indigent criminal defendants.

STATEMENT

Before the trial during which he was held in contempt began, Petitioner, an Assistant Federal Public Defender, sought leave to withdraw because of his fear that friction that had developed between himself and the trial judge in an earlier trial could harm his client. The district judge denied this request. *In re Holloway*, Pet. App. 28a (Mikva, Ch.J., dissenting). The trial which followed was punctuated by acrimonious exchanges involving other defense counsel as well as Petitioner. As Chief Judge Mikva summarized it in his opinion dissenting from the affirmance of Petitioner's client's conviction:

> The trial was long and arduous. Tensions ran high between the trial judge and virtually all of the attorneys; biting sarcasm from the bench was not infrequent, nor were the attorneys always on their best behavior. The frustration and impatience which pervaded the entire proceeding is apparent from the most casual reading of the transcript. It seems that the trial judge, as well as the attorneys, were nothing short of relieved when the trial finally drew to a close.
>
> Almost lost in the clamor of the trial were the defendants, the individuals whose fate rested in the proceedings at hand. They quite possibly wondered to themselves whether they could receive a fair trial in this courtroom, in front of this jury. They were right to wonder.

United States v. Logan, 998 F.2d 1025, 1033 (D.C. Cir. 1993).

The district court held Petitioner in contempt for violating an order forbidding him from asking a police officer called as a defense witness about an affidavit photocopied from the officer's police report "unless [the witness] had seen the affidavit before." *In re Holloway*, Pet. App. 8a. In a written motion filed the following day, Petitioner again moved to withdraw on the grounds that:

> This contempt ruling has put the defendant's counsel in a conflict of interest situation relative to the interests of the defendant in this case. Counsel has explained to the defendant that counsel's interests in avoiding being fined or sentenced at the end of the trial has eviscerated his ability to be a zealous

> advocate for the defendant. Moreover, counsel's impending sentence at the conclusion of this trial has severely distracted him from the preparation of his closing argument. Counsel has been unable to sleep and concentrate totally on the presentation of the defendant's case . . . . Counsel's family, personal and professional life have been deeply affected . . . . The possibility of substantial fine or a period of incarceration has caused considerable fear, uncertainty and anxiety among counsel and his wife. Accordingly, counsel's effectiveness has been undermined and threatens to affect his performance during the remainder of the trial.

United States v. Logan, 998 F.2d at 1035. The district court again refused to allow Petitioner to withdraw. *Id.* at 1036. A majority of the Court of Appeals concluded that the conflict between Petitioner and the district judge did not deprive his client of zealous representation, citing a motion for mistrial and a subsequent "acerbic exchange" with the district judge. *Id.* at 1029. Five months after the trial, the trial judge sentenced Petitioner to pay a $1,000 fine.[2]

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[2] Before sentencing, the district court denied Petitioner's motion to vacate the contempt finding, to hold a hearing pursuant to Fed. R. Crim. P. 42(b), and to refer the matter to another judge. The court ruled that "the merits of the underlying contempt order is not properly before the court at a sentencing hearing," so it is clear that the written representations in the motion and the opportunity to allocute were not equivalent to the right to contest a contempt funding under Rule 42(b). The district judge did, however, go on to reject Petitioner's written representations that he thought the court's order was ambiguous and that he did not willfully violate the order. In his allocution before sentencing, Petitioner reaffirmed his regret over the incident and his good faith.

REASONS FOR GRANTING THE WRIT

We urge the Court to grant review and to reverse Petitioner's contempt conviction because the district court should not have found Petitioner guilty of a crime without a hearing when he was not "punished summarily," pursuant to Fed. R. Crim. P. 42(a). The rule itself authorizes summary punishment, not summary adjudication and deferred sentencing. The threat of punishment yet to come was much more chilling than an immediate sentence would have been: here, Petitioner's own liberty lay precariously in the hands of the same judge he might legitimately challenge, although he could not disobey, as the advocate for the accused. Moreover, the trial court had a less drastic option available to enforce its evidentiary ruling; since there was no immediate need to punish it could have ordered Petitioner to show cause why he should not be held in contempt, rather than finding him guilty on the spot. A formal hearing would not have eliminated entirely the tension between Petitioner's interest and his client's, but it would have given him an opportunity to defend himself after the client's trial was over, reducing the probability that the conflict of interest would infect the client's trial. We submit that the Court's longstanding concern for the representation of the indigent by independent, conflict-free counsel, should inform its construction of Rule 42, and justifies review of the judgment below.

This case also merits review to resolve the tension between two of this Court's prior decisions, *Sacher v. United States*, 343 U.S. 1 (1952), and *Taylor v. Hayes*, 418 U.S. 488 (1974), in light of the significant developments in the law of criminal contempt since *Sacher* was decided. Summary contempt was not the "least possible power," *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821), adequate to

protect the trial from disruption. If immediate sentencing is not required to vindicate the court's authority, the court should conduct a hearing pursuant to Fed. R. Crim. P. 42(b), rather than making a summary determination of guilt under Rule 42(a).

1. The exercise of the contempt power must be guided by principles of necessity and restraint. *Young v. United States ex rel. Luis Vuitton et fils*, 481 U.S. 787, 793 (1987); *United States v. Wilson*, 421 U.S. 309 (1975). This is particularly so of the summary contempt power codified in Federal Rule of Criminal Procedure 42(a), because summary contempt proceedings depart from the requirements of "procedural regularity," ordinarily demanded of a criminal conviction. *Harris v. United States*, 382 U.S. 162, 167 (1965); *Taylor v. Hayes*, 418 U.S. at 498. "Summary punishment always, and rightly, is regarded with disfavor." *Sacher v. United States*, 343 U.S. at 8. This Court may regulate federal criminal contempts through its supervisory power, as well as through statutory and constitutional interpretation. *Young*, 481 U.S. at 799; *Offutt v. United States*, 348 U.S. 11, 14 (1954). In *Young*, the Court prohibited the appointment of the attorney for an interested party to prosecute non-summary criminal contempts under Fed. R. Crim. P. 42(b), because of the "potential for private interest to influence public duty." 481 U.S. at 805. Similarly, the Court should forbid the use of summary procedures to adjudicate contempts which create unnecessary conflicts between a lawyer's private interest to avoid punishment and the lawyer's public duty to provide zealous representation.

2. The Sixth Amendment right to counsel, "fundamental to our system of justice, is meant to assure fairness in the adversary criminal process." *United States v.*

Morrison, 449 U.S. 361, 364 (1981); *accord Lockhart v. Fretwell*, 113 S.Ct. 838, 842 (1993); *United States v. Cronic*, 466 U.S. 648, 653 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). The hallmark of advocacy within this system is the defense lawyer's independence and undivided loyalty to the client. *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979); *Polk County v. Dodson*, 454 U.S. 312, 319, 322 (1981); *id.* at 327 (Burger, C.J., concurring); *Wood v. Georgia*, 450 U.S. 261, 269 (1981); *Burger v. Kemp*, 483 U.S. 776, 784 (1987); *McCoy v. Wisconsin Court of Appeals*, 486 U.S. 429, 445-46 (1988); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *Glasser v. United States*, 315 U.S. 60, 76 (1942). "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips in crucial matters." *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct a defense." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The courts have a responsibility to assure the fairness of proceedings by identifying and preventing conflicts of interest which may impair counsel's independence or divide counsel's allegiance. *Wheat v. United States*, 486 U.S. 153, 160 (1988); *Wood v. Georgia*, 450 U.S. at 269; *Glasser*, 315 U.S. at 76. Courts have a special obligation to protect defendants who cannot retain counsel of their own, and who must accept the lawyer chosen for them.

3. The federal courts of appeals have recognized that a defense lawyer who faces prosecution, criminal investigation, or disciplinary action may have an actual conflict of interest which presumptively impairs a criminal defendant's right to counsel because it gives the lawyer a self-interest in foregoing vigorous advocacy.[3] In this context, as

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[3] *United States v. Grieg*, 967 F.2d 1018,1020-1026 (5th Cir. 1992) (conflict based upon defense counsel's potential prosecution or professional discipline as a result of obstruction of witness); *United States v. Balzano*, 916 F.2d 1273, 1292-93 (7th Cir. 1990) (trial court adequately explored conflict based on unrelated tax investigation of attorney before trial); *United States v. Lowry*, 971 F.2d 55, 61-63 (7th Cir. 1992) (defendant waived conflict based on government's investigation of attorney); *Taylor v. United States*, 985 F.2d 844, 846-47 (6th Cir. 1993) (indictment of attorney on state charges following defendant's federal trial did not establish actual conflict); *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) (investigation of lawyer for bribing police officers may have created a conflict); *United States v. Miskinis*, 966 F.2d 1263, 1267-69 (9th Cir. 1992) (record insufficient to determine whether conflict existed based upon lawyer's interest in avoiding discipline); *United States v. Fulton*, 5 F.3d 605, 609-611 (2d Cir. 1993) (allegation by government witness that defense counsel was engaged in related criminal conduct creates non-waivable conflict); *United States v. Jimenez*, 928 F.2d 356, 361-363 (10th Cir.) (no actual conflict since both counsel and client had similar interests with respect to dissemination of grand jury material), *cert. denied*, 112 S.Ct. 164 (1991); *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987) (investigation and subsequent prosecution of defense counsel created actual conflict); *United States v. Jones*, 900 F.2d 512, 518-520 (2d Cir.) (prosecutor's unfounded allegations of criminal conduct did not create an actual conflict), *cert. denied*, 498 U.S. 846 (1990); *United States v. Cancilla*, 725 F.2d 867, 870-71 (2d Cir. 1984) (commission by defense counsel of related crimes gave counsel a motive for less vigorous representation and creates an actual conflict); *United States v. Salinas*, 618 F.2d 1092, 1093 (5th Cir.) (disqualifying counsel despite waiver because of involvement in investigation of related offenses); *Mannhalt v. Reed*, 847 F.2d 576, 580-84 (9th Cir.) (counsel was

(continued...)

in many others, contempt is "a crime in the ordinary sense." *United States v. Dixon*, 113 S.Ct. 2849, 2856 (1993) (citation omitted). By holding Petitioner in contempt mid-trial, but deferring imposition of sentence until after the trial was over, the district judge maximized the conflict between Petitioner's interests and those of his client. "[A]s soon as [the district judge] held [Petitioner] in contempt, he was on notice that something would happen, possibly something quite drastic." *In re Holloway*, Pet. App. 15a. If the judge had sentenced him immediately, Petitioner would not have had to worry about whether antagonizing the judge would increase his punishment, as long as he steered clear of contempt. If, on the other hand, the judge had issued a show cause order and deferred the contempt adjudication until after trial, Petitioner would have gained the opportunity to present his own defense after his client's case was resolved.[4] Instead, Petitioner

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[3] (...continued)
accused of related crimes and had actual conflict of interest), *cert. denied*, 488 U.S. 908 (1988); *Cerro v. United States*, 872 F.2d 780, 783-784 (7th Cir. 1989) (no actual conflict of interest because government already knew of counsel's alleged involvement in related criminal activity); *United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1990) (actual conflict because counsel fraudulently procured license); *Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 19983) (actual conflict because counsel failed the bar); *Bellamy v. Cogdell*, 974 F.2d 302, 306-8 (2d Cir. 1992) (misrepresentations did not create an actual conflict requiring per se reversal), *cert. denied*, 113 S.Ct. 1383 (1993).

[4] More process could have made a difference in this case. The Court of Appeals found it "difficult to tell exactly what [Petitioner] was trying to achieve," *In re Holloway*, Pet. App. at 5a, in his examination of Officer Young. We believe there was a legitimate purpose for the examination which Petitioner should have presented to the court. Had he done so, we believe the judge would have agreed that her ruling preventing Petitioner
(continued...)

appeared before the court both as advocate and as a convicted but unsentenced criminal, whose guilt had been determined but whose punishment was in the broad sentencing discretion

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[4] (...continued)
from asking about the contents of a document the witness had not seen before was designed to protect the witness from unfair surprise, not to block counsel from laying a foundation for a document by asking a witness to identify it as a copy of his own police report. We think a calm and cogent presentation would have persuaded the judge to allow Petitioner to ask Officer Young whether he recognized the affidavit (as a photocopy) once he had an opportunity to review it.

Petitioner had no right to violate the judge's order, but he did not commit a crime if he mistakenly believed his final question complied with the order, given the limited purpose for which he wanted Young to identify the affidavit. He should have been given the opportunity, before conviction, to "urge that his behavior was not contempt but the acceptable conduct of an attorney representing his client," *Taylor v. Hayes*, 418 U.S. at 499, and that he did not willfully violate the judge's order. He might have stressed the importance of the inconsistency between Truesdale's trial testimony and the affidavit submitted to the district court by the United States as a basis for seeking detention, because Truesdale was the only one of three officers entering the room who claimed to have seen the defendant make an expansive gesture to discard drugs, under circumstances in which a more discreet drop to the floor would have been difficult to observe. He might have explained that he needed to link the affidavit signed by a third officer to Truesdale through Young because the affidavit was a copy of Young's police report based upon Truesdale's statement to him. Petitioner might have explained that an affidavit might carry more weight with the jury than a police report, and might be admissible as a party admission by the government, *see United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978). He might also have explained the difficulty he encountered in framing appropriate non-leading questions to an uncooperative witness he was forced to call on direct examination. These explanations might well have carried more weight in a formal hearing than Petitioner's written submission or his allocution before sentencing.

of the district judge. Under these circumstances, Petitioner had to chose between imperiling his own welfare or his client's. *See* D.C. Rules of Professional Conduct 1.7(b)(4) (lawyer shall not represent a client when the lawyer's judgment may be affected by lawyer's personal interest); American Bar Association, *Standards for Criminal Justice: The Defense Function* 4-3.5 (3d ed. 1993) (defense counsel should not allow personal interests to influence professional judgment). Sometimes, mid-trial summary punishment cannot be avoided, but courts should not create conflicts between appointed counsel and their clients through the exercise of the summary contempt power except when, and only to the extent, "necessary to protect the judicial institution itself." *Harris*, 382 U.S. at 167.

4. The Court should grant review to clarify whether hybrid contempt procedures which do not fit either the summary or plenary provisions of Rule 42 conform to the rule of necessity. The decision below is in conflict with decisions of the United States Court of Appeals for the Second Circuit, which has disapproved summary contempt under similar circumstances.[5] In *Sacher v. United States*, 343 U.S. at 11, this Court upheld the authority of a district judge to defer summary contempt proceedings, in their entirety, until after the trial was over, in the belief that this procedure minimized the prejudice to the accused. *Sacher* does not control this case, because Petitioner was found guilty during trial; only his sentencing was deferred. But *Sacher* also rejected the proposition that summary contempt

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[5] *United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984); *see also United States v. Stratton*, 779 F.2d 820, 836 (2d Cir. 1985) (upholding sentencing of pro se defendant at the end of the trial day), *cert. denied*, 476 U.S. 1162 (1986).

procedures may be used only when immediate punishment is required because "it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment." 343 U.S. at 11. Subsequently, in *Taylor v. Hayes*, 418 U.S. at 498-99, the Court held that "where conviction and punishment are delayed," due process requires notice and a hearing on the contempt charge, and reversed contempt judgments entered after trial on the basis of contempt findings made while the trial was in progress. *Taylor* casts doubt on the continued validity of *Sacher* as authority for deferred summary contempt proceedings. *Sacher* antedates important developments in the law of criminal contempt, *e.g.*, *Bloom v. Illinois*, 391 U.S. 194 (1968). The rule of necessity which has become central to this Court's contempt jurisprudence is inconsistent with post-trial summary contempts.

"Swiftness was not a prerequisite of justice here." *Harris*, 382 U.S. at 164. Petitioner had the worst of both worlds: the judge pronounced him guilty while "smarting under the irritation of the contemptuous act," but hung the sentence over the remainder of the trial so that it threatened Petitioner's client as well as himself. The construction of Rule 42 advanced by Petitioner reduces the likelihood that friction between an attorney and the court will jeopardize a criminal defendant's constitutional right to counsel, and properly reserves summary contempt for those rare instances when it is necessary.

CONCLUSION

The writ should be granted; Petitioner's contempt conviction should be reversed.

Respectfully submitted,

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

1. The government concedes (Br. in Opp. 8) that willfulness is an essential element of criminal contempt, and that the court of appeals relied on conduct that was not cited by the district court in the certificate of contempt to conclude that the cited conduct was willful. *See* Pet. App. 9a ("We

need not . . . rest on the cited colloquy alone").[1/] The government also acknowledges the established principle that "a reviewing court cannot uphold an order of contempt based on other, uncited conduct in which the contemnor engaged during the trial." Br. in Opp. 8. *See*, *e.g.*, *Tauber* v. *Gordon*, 350 F.2d 843, 845 (3d Cir. 1965) (*en banc*). The government contends (Br. in Opp. 9), however, that it is proper for an appellate court to consider uncited conduct to determine whether the cited conduct was willful. In support of this contention, the government asserts, without citing any authority, that a contempt certificate is like an indictment: "while the charging instrument must allege the conduct constituting the crime, it need not recite all of the evidence bearing on intent." *Id.*

The government's analogy is badly flawed. The basic purpose of an indictment is to give the defendant notice of the charges that he must defend against at trial. A contempt certificate, unlike an indictment, is not merely a "charging instrument." It is a *convicting* instrument. Because a defendant summarily convicted of criminal contempt has been deprived of a trial, the factual recitation in the certificate is the functional equivalent of the trial record.

The flaw in the government's analysis is underscored by examining the procedures available to a criminal defendant to challenge evidence of intent at trial — procedures that are unavailable in the summary contempt context. If the

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[1/] Contrary to the government's suggestion (Br. in Opp. 10 n.9), the conduct described in the contempt certificate was not sufficient to establish that petitioner acted willfully. *See* Pet. App. 39a-41a. In any event, not one of the three judges below was prepared to rely solely on the cited conduct. The question presented by the petition is whether it was appropriate for the court of appeals to comb through the record in search of additional evidence of willfulness.

prosecution seeks to admit evidence of intent at trial, the defendant has an opportunity to object, cross-examine the government's witnesses, present evidence of his own, and ultimately seek review of the trial court's evidentiary rulings. Petitioner, unlike a defendant in a criminal trial, had no notice that the court of appeals would consider incidents outside the scope of the contempt certificate, no opportunity to present evidence of his own concerning those incidents, and no right to judicial review of the appellate court's action.[2/]

In asserting that the court of appeals' decision does not conflict with decisions such as *Tauber*, the government simply ignores the fact that the court of appeals, under the guise of determining whether the cited conduct was willful, engaged in precisely the same "culling from the record [of] . . . all of the episodes of questionable conduct" that *Tauber* condemned. 350 F.2d at 845. Similarly, in asserting that the decision below does not violate the Due Process Clause or conflict with *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974) (per curiam), the government ignores this Court's ruling in *Eaton* that "the question is not upon what evidence the trial judge *could* find petitioner guilty but upon what evidence the trial judge *did* find petitioner guilty." *Id.* at 698 (emphasis in original). Because the court of appeals affirmed petitioner's conviction based on its own view of what a reasonable factfinder would have done, "the wrong entity judged the defendant guilty." *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2082 (1993).

[2/] Under Fed. R. Evid. 404(b), evidence of other wrongs is sometimes admissible at trial to show intent, but only if, upon request, the prosecution "provide[s] reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." In the summary contempt context, of course, the defendant is not even afforded a trial, let alone advance notice of the evidence of other wrongs that the reviewing court may decide to consider at the appellate stage.

The court of appeals' failure to limit its review to the facts known to have been considered by the district court is not merely an abstract or theoretical violation of due process:

> A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor . . . . Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record.

In re Little, 404 U.S. 553, 556 (1972) (Burger, C.J., concurring). The trial judge may well have omitted reference to certain conduct in the contempt certificate because she believed, based on additional information not reflected in the transcript, that the uncited conduct did not support a finding of willfulness. In addition, petitioner had no notice or opportunity to present to the factfinder his version of the uncited conduct. The court of appeals' procedure thus compounds the deprivation of basic constitutional rights that attends summary contempt convictions.

In sum, the government's effort to defend the court of appeals' procedure is unpersuasive in light of the well-established principles that summary convictions for contempt are "always, and rightly, . . . regarded with disfavor," *Sacher* v. *United States*, 343 U.S. 1 (1952), and that "the procedural requirements of Rule 42(a) must be strictly observed," see Pet. 9 (citing authorities). Further review is warranted to reconcile the court of appeals' decision with cases such as *Eaton* and *Tauber*.[3/]

[3/] The government asserts (Br. in Opp. 8) that courts of appeals reviewing summary contempt convictions "routinely" consider the entire trial record in evaluating whether a defendant's actions were willful. In

(continued...)

2. The government asserts (Br. in Opp. 13) that the decision to employ the summary procedures of Rule 42(a) "rests in the discretion of the district court" (citations omitted). That is so only if the strict requirements for applying Rule 42(a) are met — including an actual obstruction of justice and summary (*i.e.*, immediate) imposition of punishment. Where those requirements are *not* met, a district court has no discretion to employ Rule 42(a), as demonstrated by the many decisions reversing summary contempt convictions without deferring to the trial court. *See*, *e.g.*, *Harris* v. *United States*, 382 U.S. 162 (1965); *In re McConnell*, 370 U.S. 230 (1962); *United States* v. *Lumumba*, 741 F.2d 12 (2d Cir. 1984).

a. The government does not contend that Rule 42(a) is available absent an actual obstruction of justice, and it acknowledges that decisions such as *In re McConnell*, 370 U.S. at 234, and *Taberer* v. *Armstrong World Indus., Inc.*, 954 F.2d 888, 901 (3d Cir. 1992), so hold. *See* Br. in Opp. 15 & n.12. The government's sole argument is that "the court of appeals found such an interference or obstruction in this

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[3/](...continued)
support of that assertion, however, the government cites only three cases — none of which in fact supports the government. In *United States* v. *Lumumba*, 794 F.2d 806 (2d Cir.), *cert. denied*, 479 U.S. 855 (1986), the court was reviewing a *non*-summary contempt conviction following a hearing under Fed. R. Crim. P. 42(b) at which the entire trial transcript was admitted into evidence. The defendant in *Lumumba*, unlike petitioner, had an opportunity to object to the admission of evidence, cross-examine government witnesses, and present evidence in his own behalf. There was no possible due process violation in *Vaughn* v. *City of Flint*, 752 F.2d 1160, 1169 (6th Cir. 1985), or *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973), because the courts of appeals in those cases *reversed* summary contempt convictions (and did so without considering whether it was appropriate for a reviewing court to consider evidence outside the contempt certificate).

case." Br. in Opp. 15. That argument is refuted by a reading of the majority and dissenting opinions.

Chief Judge Mikva's dissenting opinion argued at length that petitioner did not obstruct justice. Pet. App. 37a-38a. The dissent observed that "a court's summary contempt power should be invoked only as a last resort," and that "[w]here obstruction of justice is not imminent, the court is bound to follow the 'normal procedure' articulated in Rule 42(b), which calls for disposition only after notice and hearing." Pet. App. 37a. Chief Judge Mikva concluded that "[t]he circumstances described in the contempt certificate do not warrant a summary contempt conviction" under Rule 42(a). Pet. App. 35a. The majority cited this discussion and dismissed it with the comment that the cases discussed in the dissenting opinion (including *In re McConnell*) "are, insofar as they clarify the meaning of the obstruction of justice element of § 401(1), not pertinent to this opinion." Pet. App. 3a n.1. The issue, however, is not whether the elements of Section 401(1) have been proved, but whether the use of the summary contempt power was improper. In concluding that the district court properly employed the Rule 42(a) procedures, the majority did not consider, let alone decide, whether petitioner actually obstructed justice. Pet. App. 12a-14a.

The government points to the court of appeals' statement that "[b]y the time Judge Johnson moved under Rule 42(a), she had a compelling need to terminate the improper questioning of Young, to deter future intentional violations of her orders, and to vindicate judicial authority to control the courtroom." Br. in Opp. 15 (quoting Pet. App. 13a). The government argues that this is "the essence" of an actual obstruction of justice. *Id.* That is not so. *Any* intentional violation of a court order creates a "need to . . . deter future intentional violations" and "vindicate judicial authority." But

it does not follow that all violations of court orders amount to an obstruction of justice. As Chief Judge Mikva pointed out, an incident that "covers two pages of the transcript and probably consumed less than a minute" simply does not rise to the level of an actual obstruction of justice. Pet. App. 37a.[4/]

b. In the petition, we pointed out that Rule 42(a) provides that "[a] criminal contempt may be punished summarily" in specified circumstances, and that the ordinary meaning of "summary" punishment is punishment "done or occurring without delay." Pet. 16 (quoting *Webster's Third New International Dictionary* 2289 (1968)). The government does not even address the plain language of Rule 42(a), nor does it cite any authority for its contention that it was appropriate to delay the imposition of punishment until five months after petitioner was held in contempt.

Moreover, the government's effort to distinguish the Second Circuit's decision in *United States* v. *Lumumba*, 741 F.2d 12, is wholly unconvincing. *See* Br. in Opp. 17. To be sure, the trial court in *Lumumba* deferred both sentencing *and* a final adjudication of the contempt charge until after trial. But the court's decision clearly did not turn on that factual difference. Instead, the Second Circuit rested its decision squarely on the impermissible delay in *punishment*:

[4/] In view of the government's apparent agreement with petitioner's legal argument, if the Court were to conclude that the other issues presented do not warrant further review, petitioner believes that it would be appropriate to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand this case for further consideration in light of *In re McConnell*, 370 U.S. at 234 ("before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice").

> [The trial judge] could have sentenced Lumumba on the spot if circumstances warranted such immediate action . . . . Yet, apparently he believed that such was unnecessary and, wishing to avoid the potential disruption of the trial and prejudice to the defendant that would have followed from Lumumba's immediate incarceration, postponed the ultimate disposition. . . . Where punishment is deferred until another day, the reason for the exception that denied due process disappears.

741 F.2d at 15, 16. *See also United States* v. *Stratton*, 779 F.2d 820, 836 (2d Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986) (emphasis added) ("where *punishment* is deferred until after trial, summary procedure may not be used"). Because petitioner would have been entitled to a Rule 42(b) hearing in the Second Circuit, this question also warrants review.[5/]

[5/] The Public Defender Service and the National Legal Aid and Defender Association have filed a brief as *amici curiae* in support of petitioner. The *amici* argue that when a trial judge summarily convicts a lawyer of contempt but defers sentencing until after the trial, the lawyer's interest in conciliating the judge conflicts with his duty to represent his client zealously. The government's suggestion (Br. in Opp. 16 n.13) that petitioner would have suffered an even greater "chill" if sentence had been imposed immediately defies common sense. A lawyer has much less to fear once the trial court has imposed sentence. And even if the lawyer holds out some hope that the judge may reduce the sentence, he will recognize that arguing after sentence has been imposed "is akin to closing the barn door after the horse has escaped." *United States* v. *Lumumba*, 741 F.2d at 17.

CONCLUSION

For the foregoing reasons, and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE JAMES R. HOLLOWAY, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals, in reviewing the sufficiency of the evidence to support a summary contempt conviction, improperly considered conduct that was not cited by the district court.

2. Whether the court of appeals erred in affirming the district court's use of the summary procedures of Fed. R. Crim. P. 42(a), rather than the notice and hearing procedures of Fed. R. Crim. P. 42(b), without determining that the defendant's conduct obstructed the administration of justice, and despite the district court's decision to delay sentencing until five months after the conduct at issue.

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IN THE

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OCTOBER TERM, 1993

No.

IN RE JAMES R. HOLLOWAY, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James R. Holloway respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-46a) is reported at 995 F.2d 1080. The order of the district court (App., *infra*, 49a-52a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1993. A petition for rehearing was denied on September 24, 1993. App., *infra*, 47a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTE AND RULE INVOLVED

Section 401 of Title 18, U.S. Code, provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42 of the Federal Rules of Criminal Procedure provides:

> (a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. That notice shall state the time and place of hearing, allowing a reasonable time for preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on

application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner, an Assistant Federal Public Defender, represented one of six co-defendants in a drug prosecution. During the trial, the district court summarily held petitioner in criminal contempt of court. Later that day, the court issued a written order and certificate of contempt pursuant to Fed. R. Crim. P. 42(a). Five months later, the district court sentenced petitioner to pay a $1,000 fine. A divided court of appeals affirmed. App., *infra*, 1a-46a.

1. Petitioner's client Kelvin Rascoe was charged with possessing more than 5 grams of cocaine base with intent to distribute it. The government's case against Rascoe was based primarily on the testimony of a single police officer, Truesdale, who testified that while executing a search warrant at a house in the District of Columbia, he entered a bedroom and observed Rascoe tossing plastic bags and rocks of crack cocaine into the air. Other officers who entered the room with Officer Truesdale did not see Rascoe toss any objects. App., *infra*, 27a-29a.

Because Officer Truesdale's testimony was the only evidence that Rascoe physically possessed the drugs, attacking Truesdale's credibility was critical to Rascoe's defense.

Petitioner planned to challenge Officer Truesdale's testimony by introducing a contemporaneous statement by Truesdale in which he mentioned only that Rascoe tossed the objects onto the ground. To this end, petitioner called as defense witnesses two police officers, Young and Condit, to lay a foundation for the admission of a *Gerstein* affidavit signed by Officer Condit.[1/] Petitioner planned to show that the body of the *Gerstein* affidavit had been photocopied from a police report dictated to Officer Young by Officer Truesdale. App., *infra*, 29a-30a.

The district court (Norma Holloway Johnson, J.) limited petitioner's examination of Officer Young because it believed that petitioner was attempting to elicit testimony from Young based upon the contents of a document the officer had never seen. In fact, petitioner was merely attempting to elicit the fact that the body of the *Gerstein* affidavit was a photocopy of Officer Young's police report.

After petitioner made several unsuccessful attempts to frame a question that would elicit this fact, the district court summarily found him in criminal contempt of court. Pursuant to Fed. R. Crim. P. 42(a), the court issued a contempt certificate to which it attached eight pages of the trial transcript. App., *infra*, 49a-63a. The certificate made no reference to any events at trial other than those described in the transcript excerpt. App., *infra*, 50a-52a. Five months later, Judge Johnson sentenced petitioner to pay a $1,000 fine and informed his superior that he was not permitted to appear in her courtroom in the future.[2/]

[1/] A *Gerstein* affidavit is submitted to the court to provide a basis for the judicial finding of probable cause necessary to justify retaining a suspect in custody after an arrest. *See Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

[2/] The district court stayed execution of the sentence pending the completion of any appeal. C.A. App. 106.

2. A divided court of appeals affirmed. App., *infra*, 1a-46a. The court acknowledged that "[n]either the contempt order, the contempt certificate, nor the record indicates which of the three subsections [of 18 U.S.C. § 401 the district court] invoked." App., *infra*, 2a. The court nevertheless held that the conviction was valid under 18 U.S.C. § 401(3) (1988).

The court stated that "[t]he elements of contempt under § 401(3) are straightforward." App., *infra*, 3a. "First, the alleged contemnor must "[d]isobe[y] or resist[] . . . [the] lawful writ, process, order, rule, decree, or command" of the court." *Id.*, quoting 18 U.S.C. § 401(3). "Second, . . . [t]he disregard of authority must be willful." App., *infra*, at 3a. The court stated that "willfulness may be inferred if a lawyer's conduct discloses a reckless disregard for his professional duty." *Id.* (internal quotation omitted). The court further stated:

> While the reviewing court may not affirm if the *cited* conduct has not been contumacious, . . . the analysis of intent properly encompasses the contemnor's behavior in related instances such as disobedience or resistance to other orders of the court.

Id. at 3a-4a (emphasis in original), citing *United States* v. *Lumumba*, 794 F.2d 806, 811 (2d Cir.), *cert. denied*, 479 U.S. 855 (1986); *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973).

The court of appeals concluded that petitioner had disobeyed the district court's order. App., *infra*, 7a. The district court "made it plain that [it] would not allow the witness to compare the wording in the documents unless it were first established that the witness had seen the *Gerstein* affidavit before." *Id.* at 7a-8a.

The court further concluded that petitioner acted with culpable intent. The court stated that petitioner's "devious pretense that it would be enough if Young saw the document in court that very day . . . points strongly in the direction of willfulness." App., *infra*, 9a. But the court concluded that it "need not . . . rest on the cited colloquy alone," because "[o]ther episodes of [petitioner's] conduct in the *Rascoe* trial render the conclusion that he acted with culpable intent almost inescapable." *Id.* The court proceeded to consider three incidents that were not mentioned in the district court's contempt order or certificate. *Id.* at 9a-12a. The court left open the possibility that "a reviewing court may look at incidents from other trials to evaluate the contemnor's intent." *Id.* at 10 n.4.

In addition, the court of appeals concluded that the district court properly employed the summary contempt procedures of Fed. R. Crim. P. 42(a) rather than the notice and hearing procedures of Rule 42(b). App., *infra*, 12a-14a. The court found that "the necessity of preserving order justified use of 42(a)," because the district court "had a compelling need to terminate the improper questioning of Young, to deter future intentional violations of her orders, and to vindicate judicial authority to control the courtroom." *Id.* at 13a.[3/]

Chief Judge Mikva dissented. App., *infra*, 27a-46a. He concluded that "[w]hat occurred between [petitioner] and [the district court] was quite typical of the frequently murky and unproductive exchanges that characterize so much of trial practice." *Id.* at 35a. He found no evidence in the record that petitioner actually obstructed justice. Petitioner "did not raise his voice or treat the judge with disrespect, and the entire incident covers two pages of the transcript and probably

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[3/] The court of appeals also held that the district judge was not required to refer the matter to another judge, App., *infra*, 14a, and that the $1,000 fine was not excessive, *id.* at 14a-16a.

consumed less than a minute." App., *infra*, 37a, citing *In re McConnell*, 370 U.S. 230, 235-36 (1962). The dissenting judge noted that "other appellate courts have declined to find obstruction in cases involving conduct far more egregious than that at issue here." App., *infra*, 38a (citing cases).

Chief Judge Mikva also concluded that the contempt certificate did not set forth facts that established willfulness and contumacious conduct beyond a reasonable doubt. App., *infra*, 39a-42a. He concluded that the district court's directions to petitioner were not clear and unequivocal, and thus could not be a basis for convicting him of criminal contempt. The dissenting judge disagreed with "[t]he majority's efforts to infer contumacious intent from other incidents of allegedly contumacious conduct in the record." *Id.* at 43a. "Where the actions described in the contempt certificate, taken alone, are insufficient to support a conviction for contempt, the contempt conviction may *not* be saved by pointing to similar incidents of borderline, or even contemptuous, conduct in the record." *Id.* at 43a-44a (emphasis in original; citing *Eaton* v. *City of Tulsa*, 415 U.S. 697, 699 (1974)). Because "the district court did not refer to or even hint that the contempt conviction was related to any past instances of misconduct, . . . the majority's attempt to save [petitioner's] conviction by combing the record in search of any minor excess of advocacy . . . is unacceptable." App., *infra*, 44a.

REASONS FOR GRANTING THE PETITION

This Court has granted review of summary contempt convictions because of the "'importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt.'" *In re McConnell*, 370 U.S. at 233 (quoting *Offutt* v. *United States*, 348 U.S. 11, 13 (1954)). A restrained exercise of the summary contempt power is particularly important in this case, because petitioner was representing a defendant in a jury trial of criminal

charges. In an adversary system based on "partisan advocacy," *Herring* v. *New York*, 422 U.S. 853, 862 (1975), counsel must not be "distract[ed] . . . from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984). Further review is warranted because the court of appeals' decision will chill counsels' zealous representation of their clients.

In addition, the court of appeals' decision conflicts with decisions of this Court and other courts of appeals. In reviewing the sufficiency of the evidence that petitioner acted with culpable intent, the court of appeals relied on incidents that were not cited in the district court's contempt certificate. The court of appeals' decision is contrary to a well-established principle, mandated by due process considerations, that appellate review of summary contempt convictions is limited to conduct cited by the district court. Moreover, the court of appeals held that petitioner was not entitled to notice and a hearing under Fed. R. Crim. P. 42(b), even though the court of appeals did not conclude that petitioner had obstructed the administration of justice, and even though the district court delayed the imposition of punishment until five months after the conduct that gave rise to the conviction. The court's decision conflicts with decisions of other courts of appeals holding that summary conviction under Fed. R. Crim P. 42(a) is improper in these circumstances. The petition for a writ of certiorari should be granted to resolve these conflicts and to protect the integrity of the adversary system.

1. Criminal contempt is "'a crime in the ordinary sense.'" *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993) (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)). It is "a public wrong which is punishable by fine or imprisonment or both." *Bloom*, 391 U.S. at 201; *see Gompers* v. *United States*, 233 U.S. 604, 610 (1914). Accordingly, "constitutional protections for criminal defendants . . . apply in non-summary criminal contempt

prosecutions just as they do in other criminal prosecutions." *Dixon*, 113 S. Ct. at 2856.

Summary punishment for contempt is an exception to this principle that "always, and rightly, is regarded with disfavor," *Sacher* v. *United States*, 343 U.S. 1, 8 (1952), because it imposes criminal punishment without according basic constitutional protections to the defendant. The trial court acts as prosecutor and jury, and the defendant is not entitled to notice or a hearing. The Court "has long recognized the potential for abuse in exercising the summary power to imprison for contempt." *Bloom*, 391 U.S. at 202 (collecting authorities). Because of this danger, it is well settled that "the procedural requirements of Rule 42(a) must be strictly observed." *United States* v. *Schrimsher*, 493 F.2d 842, 844-45 (5th Cir. 1974) (footnote omitted). *See United States* v. *Marshall*, 451 F.2d 372, 374 (9th Cir. 1971); *Pietsch* v. *President of United States*, 434 F.2d 861, 864 (2d Cir. 1970) (Clark, J.), *cert. denied*, 403 U.S. 920 (1971).

A basic procedural requirement of Rule 42(a) is that the contempt order or certificate "shall recite the facts." Fed. R. Crim. P. 42(a). "This recitation of the facts in the certificate is of critical importance." *Marshall*, 451 F.2d at 374.

> Because the defendant has been convicted without notice or hearing, there is no record of the conviction upon which appellate review may be based. The factual recitation in the certificate supplies this deficiency. Accordingly, '[t]his requirement is more than a formality. It is essential to disclosure of the basis of decision with sufficient particularity to permit informed appellate review.'

Id. at 374-75 (quoting *Tauber* v. *Gordon*, 350 F.2d 843, 845 (3d Cir. 1965) (*en banc*)). *See Schrimsher*, 493 F.2d at 845.

In *Tauber*, the court of appeals concluded that the lawyer's behavior on the one occasion specifically identified by the district court was insufficient to support a contempt conviction, and that the conviction could not be affirmed on the basis of the district court's generalized references to the lawyer's course of conduct throughout the trial. 350 F.2d at 845. The court of appeals rejected the prosecutor's effort to support the conviction "by culling from the record and presenting to this court all of the episodes of questionable conduct by Tauber and contention between court and counsel which the court may have had in mind." *Id.* The court held that "counsel's enumeration of occurrences which, in his view after the event, afforded a proper basis for a contempt order cannot be substituted for the required specification by the trial judge of the facts upon which he actually predicated his contempt order." *Id.* "A criminal contempt order, like any other conviction of crime, must stand or fall on the sufficiency of the specification of wrongdoing upon which it is based." *Id.* at 845 n.1.

The rule of *Tauber* and similar cases is mandated by fundamental principles of due process governing appellate review. The district court's order and certificate comprise the record of the facts supporting a summary contempt conviction. Just as an appellate court cannot look outside the record in reviewing the sufficiency of the evidence to support an ordinary criminal conviction, it cannot look beyond the conduct cited by the district court in reviewing a summary contempt conviction. As this Court observed in *Eaton* v. *City of Tulsa*, 415 U.S. 697, 698 (1974), "the question is not upon what evidence the trial judge *could* find petitioner guilty but upon what evidence the trial judge *did* find petitioner guilty."

In *Eaton*, the defendant was convicted of criminal contempt for using an expletive while testifying in court. The state appellate court affirmed the conviction on the basis of its own examination of the trial record, which revealed other incidents of misconduct by the defendant. This Court

summarily reversed. Because "the trial judge rested the conviction upon the use of an expletive only," the state appellate court "denied petitioner constitutional due process in sustaining the trial court by treating the conviction as a conviction upon a charge not made." *Id.* *See Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2082 (1993) (when reviewing court affirms a conviction based on its view of what a reasonable factfinder would have done, "the wrong entity judge[s] the defendant guilty") (internal quotation omitted).

The court of appeals' decision in this case rests on precisely the sort of improper appellate fact-finding that was condemned in cases such as *Eaton* and *Tauber*. The court of appeals did not hold that the conduct identified by the district court was sufficient to support the contempt conviction. Instead, it combed the record for other incidents that were not cited or relied upon by the district court to bolster the sufficiency of the evidence of *mens rea*. Pet. App. 9a-12a. The court of appeals' procedure is equivalent to permitting the government to defend a conviction by presenting new evidence on appeal that was not presented at trial.

Such a procedure cannot be squared with basic due process requirements. Petitioner had no notice that the court of appeals would consider incidents outside the scope of the district court's contempt certificate, he had no opportunity to present evidence of his own concerning those incidents, and there was no procedure available to him to obtain judicial review of the appellate court's findings of fact. Petitioner, having been deprived of notice and a hearing at the trial level, was also deprived of the opportunity to be heard as to the new facts relied upon by the court of appeals. The court of appeals' fact-finding thus subjected petitioner to an impermissible double dose of constitutional deprivation.

There is no basis for the court of appeals' assertion that "the analysis of intent properly encompasses the contemnor's behavior in related incidents such as disobedience or

resistance to other orders of the court." App., *infra*, 3a-4a. Appellate fact-finding concerning *mens rea* is no different from appellate fact-finding concerning other elements of a criminal offense. The court of appeals was not present when the uncited conduct occurred; its impressions gleaned from the transcript may be quite different from those of the district court. The district court may have believed, on the basis of additional information not available to the court of appeals, that the uncited conduct did not support an inference of culpable intent. Indeed, the district court may have been momentarily distracted and thus not have actually seen or heard the uncited conduct. If so, that conduct cannot support a summary contempt conviction. *See* Fed. R. Crim. P. 42(a).[4/]

If the court of appeals is permitted to look beyond the conduct cited by the district court for evidence of *mens rea*, there is no principled reason why it cannot do so for other elements of the offense. And if the court of appeals is permitted to look beyond conduct specified by the district court, there is no reason why it should be confined to the record of the proceedings in which the conduct occurred. Indeed, the court of appeals expressly left open the possibility that a court of appeals may consider incidents of misconduct from other trials. App., *infra*, 10a n.4.

Neither of the decisions cited by the court of appeals supports its position. In *United States* v. *Lumumba*, 794 F.2d 806, 812 (2d Cir.), *cert. denied*, 479 U.S. 855 (1986), the district court's summary contempt findings "quoted from the transcript other prior examples of [the defendant's] conduct

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[4/] In addition, it would have been improper for the district court to convict petitioner summarily under Fed. R. Crim. P. 42(a) for conduct that occurred one or two weeks earlier during the trial. *See* pp. 15-17 *infra*. Thus, it plainly was improper for the court of appeals, more than a year later, to affirm a summary contempt conviction on the basis of uncited conduct without hearing evidence or giving petitioner an opportunity for response.

which support[ed] the inference that he was making a calculated insult to the judge" when he engaged in the cited conduct. The Second Circuit nevertheless *reversed* the district court's summary conviction of a defense lawyer pursuant to Rule 42(a) and remanded for a hearing pursuant to Rule 42(b). *See United States* v. *Lumumba*, 741 F.2d 12 (2d Cir. 1984). The court of appeals subsequently affirmed the lawyer's contempt conviction following a Rule 42(b) hearing in which the entire trial transcript was admitted into evidence. *See* 794 F.2d at 815. In this case, the district court did not refer to other instances of misconduct, and petitioner has not been accorded a hearing pursuant to Rule 42(b).

The court of appeals' reliance on *In re Farquhar*, 492 F.2d 561 (D.C. Cir. 1973), is similarly misplaced. In *Farquhar*, the court reversed a lawyer's summary contempt conviction for appearing late at a court proceeding, noting that there was "no evidence" that the lawyer "was repeatedly unpunctual." *Id.* at 564. The court contrasted Farquhar's situation with that of a lawyer in another contempt proceeding in which the district judge noted on the record "that the attorney's tardiness had 'happened many times in the past.'" *Id.* (quoting *In re Niblack*, 476 F.2d 930 (D.C. Cir.), *cert. denied*, 414 U.S. 909 (1973)).[5/]

[5/] The court of appeals did not cite or rely on *In re Chaplain*, 621 F.2d 1272, 1276 (4th Cir.) (*en banc*), *cert. denied*, 449 U.S. 834 (1980), a case that increases the divergence in the courts of appeals on this issue. *Chaplain* held that "where the record reveals a pattern of potentially disruptive conduct preceding a summary conviction, the specification of a single episode adequately charges as well the entire course of like antecedent conduct from the time when it was fairly identified to the contemnor as potentially contumacious." Thus, most courts of appeals reviewing summary contempt convictions will not consider uncited conduct; the D.C. Circuit will consider uncited conduct that is relevant to the defendant's intent; and the Fourth Circuit will consider uncited conduct if it is part of a "pattern" of "like antecedent" conduct.

In sum, the court of appeals' reliance on evidence outside the contempt certificate is contrary to decisions of this Court and other courts of appeals, and warrants an exercise of this Court's supervisory authority to ensure that lawyers in criminal cases are not deterred from engaging in the zealous advocacy essential to the "ultimate objective" of the adversary system, that "the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. at 862.

2. The court of appeals also erred in affirming (App., *infra*, 12a-14a) the district court's decision to use the summary procedures of Fed. R. Crim. P. 42(a) rather than the notice and comment procedures of Fed. R. Crim. P. 42(b). Rule 42(b) "provides the normal procedure" for contempt adjudications, *Harris* v. *United States*, 382 U.S. 162, 164 (1965); Rule 42(a) is "reserved for exceptional circumstances, . . . such as acts threatening the judge or disrupting a hearing or obstructing court proceedings," 382 U.S. at 164 (internal quotation omitted). *See also* 1 ABA *Standards for Criminal Justice* Standard 6-4.4 commentary at 53 (1980) (punishment without notice or opportunity to be heard "is inconsistent with the basic notions of fairness, and is likely to bring disrespect on the court").

The court of appeals' approval of the Rule 42(a) procedure is doubly flawed. First, a court of appeals may not affirm a summary conviction under Rule 42(a) unless it determines that the defendant's conduct actually obstructed the administration of justice. The court of appeals made no such determination here; indeed, the court of appeals dismissed the issue as irrelevant. Second, the summary procedures of Rule 42(a) are inappropriate where, as here, the district court delays the imposition of punishment until months after the conduct at issue.

a. In affirming the district court's decision to employ the summary procedures of Rule 42(a), the court of appeals failed to determine whether petitioner actually obstructed the

administration of justice. Although Chief Judge Mikva's dissenting opinion argued at length that there was no obstruction, App., *infra*, 37a-38a, the majority responded only in a footnote, stating that the cases discussed by Chief Judge Mikva "are, insofar as they clarify the meaning of the obstruction of justice element of § 401(1), not pertinent to this opinion." *Id.* at 3a n.1. In holding that the district court properly employed the summary procedures of Rule 42(a), the court of appeals simply ignored the question whether petitioner's conduct obstructed justice. *See* App., *infra*, 12a-14a.

The court of appeals' decision conflicts with decisions of this Court and other courts of appeals holding that the existence of an obstruction of justice is "pertinent" — and, indeed, essential — to a determination of whether the district court may employ the summary procedures of Rule 42(a). This Court has held that "before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice." *In re McConnell*, 370 U.S. 230, 234 (1962); *see also Ex parte Hudgings*, 249 U.S. 378, 383 (1919) ("An obstruction to the performance of judicial duty . . . must clearly be shown in every case where the power to punish for contempt is exerted.").

Similarly, in *Taberer* v. *Armstrong World Indus., Inc.*, 954 F.2d 888, 901 (3d Cir. 1992), the court concluded that "[b]ecause of the danger that the summary contempt power will be abused, both Congress and the Court have narrowed its scope by requiring a showing of obstruction before contempt may be punished summarily." *See also United States* v. *Turner*, 812 F.2d 1552, 1568 (11th Cir. 1987) (Rule 42(a) applies only if "there has been an actual obstruction of justice"); *Vaughn* v. *City of Flint*, 752 F.2d 1160, 1167 (6th Cir. 1985); *Gordon* v. *United States*, 592 F.2d 1215, 1217 (1st Cir.), *cert. denied*, 441 U.S. 912 (1979); 58 A.L.R. Fed. 22, 53-55 (1982) (collecting cases). Further review is

warranted to resolve the conflict between the decision in this case and decisions such as *Taberer*.[6/]

b. In addition, the court of appeals affirmed petitioner's conviction under Fed. R. Crim. P. 42(a) even though the district court did not sentence petitioner until five months after it held him in contempt. The court of appeals' conclusion that the summary procedures of Rule 42(a) apply in these circumstances is contrary to the plain language of Rule 42(a), and conflicts with decisions of other courts of appeals.[7/]

Rule 42(a) provides that in specified circumstances "[a] criminal contempt may be punished summarily." "Summary" means "done or occurring without delay or formality: quickly executed." *Webster's Third New International Dictionary* 2289 (1968). "Summary punishment" is thus punishment "performed or meted out speedily and unceremoniously." *Webster's II New Riverside University Dictionary* 1160 (1988). It follows that a district court may employ Rule 42(a) only if it imposes punishment on the contemnor without

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[6/] Because the court of appeals did not consider whether petitioner's conduct obstructed the administration of justice, there is no occasion for this Court to consider that issue in the first instance. In any event, an incident that "covers two pages of the transcript and probably consumed less than a minute," App., *infra*, 37a, and involves nothing more than defense counsel questioning a witness in the midst of a three-week trial, could not have obstructed justice. Other courts of appeals have found that far more egregious conduct did not obstruct justice. *See, e.g., United States ex rel. Robson* v. *Oliver*, 470 F.2d 10 (7th Cir. 1972); *United States* v. *Sopher*, 347 F.2d 415, 418 (7th Cir. 1965).

[7/] The district court below did not comply with the notice and hearing procedures of Rule 42(b). At the sentencing hearing, the district court expressly noted that "the question of the merits of the underlying contempt order is not properly before the court." C.A. App. 82.

delay. In this case, the imposition of punishment plainly was not speedy.[8/]

In *United States* v. *Lumumba*, 741 F.2d 12 (2d Cir. 1984), the district court cited counsel for contempt on two occasions during the trial. After the trial ended, the court summarily convicted counsel pursuant to Fed. R. Crim. P. 42(a); thereafter, another judge imposed sentence on counsel. The Second Circuit held that the district court was required to proceed under Fed. R. Crim. P. 42(b). The court of appeals observed that the district judge "could have sentenced Lumumba on the spot if the circumstances warranted such immediate action." 741 F.2d at 15 (citing *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 512-15 (1974)). "Yet, apparently he believed that such was unnecessary and, wishing to avoid the potential disruption of the trial and prejudice to the defendant that would have followed from Lumumba's immediate incarceration, postponed the ultimate disposition." 741 F.2d at 15 (citation omitted). The Second Circuit concluded that a notice and hearing is required when the district court "postpones the ultimate disposition" rather than "sentenc[ing the defendant] on the spot." *Id. See also United States* v. *Stratton*, 779 F.2d 820, 836 (2d Cir. 1985) ("Where punishment is deferred until after trial, summary procedure may not be used"), *cert. denied*, 476 U.S. 1162 (1986); *United States* v. *Dowdy*, 960 F.2d 78, 82 (8th Cir. 1992) (Rule 42(a) procedure appropriate where district court "immediately found [counsel] in contempt and simultaneously sentenced her to pay a fine").

The Second Circuit's opinion in *Lumumba* acknowledged that in *Sacher* v. *United States*, 343 U.S. 1 (1952), this Court held that Rule 42(a) permits a district court, in its discretion,

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[8/] The district court held petitioner in contempt on October 8, 1991. App., *infra*, 2a. It entered an order of conviction and a certificate later that day. The court sentenced petitioner on March 10, 1992. C.A. App. 80.

to defer exercise of the summary punishment power until the completion of the trial. But the Second Circuit concluded "that such is not the present rule and that *Sacher* has limited vitality as precedent, even though it has not been expressly disavowed." *Id.* The Second Circuit correctly reasoned that, because this Court "ha[s] only permitted summary punishment as an immediate necessity to uphold a tribunal's authority . . . [w]here punishment is deferred until another day, the reason for the exception that denied due process disappears." 741 F.2d at 16. That reasoning applies *a fortiori* in this case, because the district court deferred the imposition of punishment until long after the trial was completed.

As the Second Circuit recognized, the continuing authority of *Sacher* is doubtful in the light of this Court's opinion in *Taylor* v. *Hayes*, 418 U.S. 418 (1974). In *Taylor*, a state trial judge held counsel for a defendant in contempt on nine separate occasions during the trial, but did not impose sentence until the conclusion of the trial. This Court reversed the judgment of conviction, holding that due process requires that "before an attorney is finally adjudicated in contempt and sentenced after trial for contempt during trial, he should have reasonable notice of the specific charges and an opportunity to be heard on his own behalf." 418 U.S. at 498-99. Then-Justice Rehnquist, joined by then-Chief Justice Burger, concluded that the holding in *Taylor* was "squarely contrary to the holding in *Sacher*." *Codispoti*, 418 U.S. at 525 (Rehnquist, J., dissenting). *See also Harris* v. *United States*, 382 U.S. 162, 165 (1965) (Rule 42(a) appropriate where "instant and summary punishment . . . [is] necessary").

In sum, the court of appeals' decision merits further review because petitioner would have been entitled to notice and a hearing in other circuits, and because the conflicting

lower court decisions in this area reflect uncertainty about the continuing validity of this Court's own decisions.[9/]

CONCLUSION

The petition for a writ of certiorari should be granted.[10/]

Respectfully submitted.

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DECEMBER 1993

[9/] If this Court grants the petition for a writ of certiorari, petitioner will ask the Court to direct that any proceedings on remand be conducted before a different district judge. The district judge's actions — in particular, her direction that petitioner, who remains an Assistant Federal Public Defender, may not appear before her in any future case — indicate that the judge has become personally embroiled with petitioner. *See Taylor* v. *Hayes*, 418 U.S. at 502 (order "disbarring [defendant] from further practice in [judge's] court" reflected judge's personal involvement).

[10/] In the alternative, the Court may wish to hold the petition for a writ of certiorari in this case pending its decision in *International Union, United Mine Workers of Am.* v. *Bagwell*, No. 92-1625. Although that case presents questions concerning the difference between civil and criminal contempt, it is possible that the Court's decision will shed light on the distinction between summary criminal contempt and non-summary criminal contempt. *See* No. 92-1625 U.S. Br. at 17, 21-22 (discussing implications of petitioners' arguments for summary criminal proceedings).

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 12, 1993 Decided June 11, 1993

No. 92-3085

IN RE JAMES R. HOLLOWAY

Appeal from the United States District Court
for the District of Columbia
(91cr00183)

Elliott Schulder argued the cause for appellant.

Ann Simon, Assistant U.S. Attorney, argued the cause for the appellee. With her on the briefs were *Jay B. Stephens*, U.S. Attorney at the time the brief was filed, and *John R. Fisher*, Assistant U.S. Attorney.

Three organizations filed a joint *amicus curiae* brief. *Elizabeth Taylor* was on the brief for the Public Defender Service for the District of Columbia. (*James W. Klein* also entered an appearance.) *William B. Moffitt* was on the brief for the National Association of Criminal Defense Lawyers. *Roger M. Adelman* was on the brief for the Criminal Law and Individual Rights Section of the District of Columbia Bar.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: MIKVA, *Chief Judge*, WILLIAMS and HENDERSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Chief Judge* MIKVA.

WILLIAMS, *Circuit Judge*: On October 8, 1991, in the course of a six-defendant drug trial (*United States v. Rascoe*), District Judge Norma Holloway Johnson entered an oral order holding one of the defense counsel, James R. Holloway, in criminal contempt. Judge Johnson later that day issued a written order and certificate of contempt pursuant to Fed. R. Crim. P. 42(a). On March 10, 1992, Judge Johnson imposed sentence in the form of a $1,000 fine. Because we find that there was an adequate basis to support the contempt conviction and no procedural error, we affirm.

Sufficiency of the Evidence

Judge Johnson convicted appellant under 18 U.S.C. § 401, which provides that:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Neither the contempt order, the contempt certificate, nor the record indicates which of the three subsections Judge Johnson invoked. Subsection (2) is clearly inapplicable: an attorney is not an "officer" of the court within the meaning of 18 U.S.C. § 401(2). See *Cammer v. United States*, 350 U.S. 399, 404–05 (1956); *In re Brown*, 454 F.2d 999, 1003 (D.C.

Cir. 1971). Because we find the conviction valid under subsection (3), we need not address subsection (1).[1]

The elements of contempt under § 401(3) are straightforward. First, the alleged contemnor must "[d]isobe[y] or resist[ ] . . . [the] lawful writ, process, order, rule, decree, or command" of the court. 18 U.S.C. § 401(3). Of course, the relevant order or command must be sufficiently "clear and unequivocal at the time it is issued." *Traub v. United States*, 232 F.2d 43, 47 (D.C. Cir. 1955). Whether an order is clear enough depends on the context in which it is issued and the audience to which it is addressed. See, e.g., *United States v. Robinson*, 922 F.2d 1531, 1534 (11th Cir. 1991). Accord *United States v. Turner*, 812 F.2d 1552, 1567 (11th Cir. 1987) ("[e]ven an egregiously vague order may be thought adequate to cover conduct so gross as to fall within its core.")

Second, although § 401(3) does not explicitly mention *mens rea*, wrongful intent is necessary. The disregard of authority must be willful; willfulness " 'may be inferred if a lawyer's conduct discloses a reckless disregard for his professional duty.' " *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973) (quoting *Sykes v. United States*, 444 F.2d 928, 930 (D.C. Cir. 1971)). See also *United States v. Greyhound Corp.*, 508 F.2d 529, 531–32 (7th Cir. 1974) (stating that criminal contempt requires "a volitional act done by one who *knows or should reasonably be aware* that his conduct is wrongful") (emphasis added) (internal quotations omitted). While the reviewing court may not affirm if the *cited* conduct has not been contumacious, see *United States v. Lumumba*, 794 F.2d 806, 811 (2d Cir. 1986), the analysis of intent properly encom-

[1] Accordingly, cases such as *In re McConnell*, 370 U.S. 230 (1962); *In re Brown*, 454 F.2d 999 (D.C. Cir. 1971); *United States ex rel. Robson v. Oliver*, 470 F.2d 10 (7th Cir. 1972); *United States v. Sopher*, 347 F.2d 415 (7th Cir. 1965); *United States v. Meyer*, 346 F. Supp. 973 (D.D.C. 1972), discussed in the Dissent at 11–12, are, insofar as they clarify the meaning of the obstruction of justice element of § 401(1), not pertinent to this opinion. See *In re Brown*, 454 F.2d 999, 1003–04 (discussing § 401(1)), 1005–09 (discussing § 401(3)).

passes the contemnor's behavior in related incidents such as disobedience or resistance to other orders of the court. See *id.*; see also *Farquhar*, 492 F.2d at 564 (contrasting aberrational with recurrent lapses when analyzing intent).

In deciding whether the evidence is sufficient to support a contempt conviction, we use the familiar standard for any criminal conviction, asking whether "a fair-minded and reasonable trier of fact [could] accept the evidence as probative of a defendant's guilt beyond a reasonable doubt". *In re Joyce*, 506 F.2d 373, 376 (5th Cir. 1975); accord *In re Brown*, 454 F.2d 999, 1008 (D.C. Cir. 1971).

The key colloquy—set forth verbatim in Judge Johnson's certificate of contempt and in Appendix A to this opinion—occurred during Holloway's direct examination of Officer Darrell Young, conducted by Holloway on behalf of his client, Kelvin Rascoe. Before that passage, Young testified that he prepared an arrest form for Rascoe—known as a "PD 163"—that contained a narrative statement of facts relating to the arrest and alleged offense. Young also confirmed the earlier testimony of Officer Edward Truesdale, who said that Young, in preparing the statement of facts for his PD 163, had relied on information provided by Truesdale and a third officer. In addition, Young confirmed Truesdale's testimony that Young had not personally observed any of the events reported in Young's PD 163. See Tr. 10/8 at 70–71, 74, 76–77; see also Tr. 9/30 at 48–49.

After eliciting that evidence, Holloway proceeded to ask Young a series of questions regarding what information did and did not appear in the fact statement of his PD 163. See Tr. 10/8 at 72–73. Following an objection, the court ruled the line of inquiry impermissible because Young had no personal knowledge about any of the information in the statement. See *id.* at 73. This ruling led to a question from Holloway, to which Young replied unequivocally, "I don't have any personal knowledge of the crime being committed"—namely, the "transaction . . . indicated in that first paragraph [of the PD 163]." *Id.* at 77 (latter quotation taken from appellant's question).

Now we come to the incident that is at issue and is quoted in full in Appendix A. First, Holloway asked the court for permission to mark for identification a document in the court's own case files—a "*Gerstein* statement", *i.e.*, an affidavit filed to provide a proper basis for the judicial finding of probable cause that *Gerstein v. Pugh*, 420 U.S. 103 (1975), requires to justify restraint after an arrest. That document contained a narrative statement to which yet another officer, Robert Condit, had sworn after Young completed his PD 163. Holloway stated that he wanted to show Young the *Gerstein* affidavit to enable Young to compare it to his PD 163 and to offer an opinion on whether Condit photocopied the statement of facts from Young's PD 163 onto the *Gerstein* affidavit. The Court ruled that such an opinion would be "totally irrelevant". Tr. 10/8 at 78.

Holloway responded that he wanted to have Young make the comparison in preparation for a planned examination of Condit about where he obtained the information for his *Gerstein* statement. Although it is difficult to tell exactly what Holloway was trying to achieve by having Young compare the statement of facts from his PD 163 with the text of Condit's *Gerstein* affidavit (which contained an obvious photocopy of the PD 163's statement), as best as we can tell Holloway was pursuing this inquiry in a roundabout effort to avoid an earlier evidentiary ruling of the court. Whether that was his purpose or not, Judge Johnson's prior ruling is worth a look, as it parallels her ruling here and thus illuminates Holloway's state of mind.

In the prior ruling, the judge barred Holloway from attempting to impeach Officer Truesdale—the only witness with firsthand knowledge of the events surrounding the arrest—with the contents of *Young*'s PD 163. See Tr. 9/30 at 50–51, 55–56. Truesdale had testified that when he confronted Rascoe while executing the search of the house, Rascoe was tossing ziplock bags containing white rocks into the air and onto the floor. Holloway confronted Truesdale with the PD 163 that *Truesdale* had prepared for Rascoe's girlfriend/codefendant, in which Truesdale stated that he saw Rascoe tossing ziplock bags containing white rocks onto the floor; Trues-

dale's PD 163 did not mention his tossing them into the air. See *id.* at 55–56. If Holloway could have confronted Truesdale with Young's PD 163, in which Young also stated that Rascoe was tossing the bags onto the floor (i.e., he too omitted any "into the air" reference), he could have reemphasized the "discrepancy" that he had already shown in Truesdale's testimony. Judge Johnson properly refused to allow such questioning, which would have been cumulative and which in any event lacked a foundation such as a showing that Truesdale saw Young's PD 163 and adopted it, a possibility Truesdale expressly denied. See *id.* at 49. Putting that aside, however, it appears that Holloway wanted Young to attest that Condit's affidavit contained a photocopy of the statement of facts from Young's PD 163 so that Holloway later could revisit the "into the air" discrepancy when questioning Condit.

Regardless of where Holloway may have been trying to go with his examination,[2] Judge Johnson informed him that he must first establish a foundation by inquiring whether Young had ever seen the *Gerstein* affidavit before. *Id.* at 79. Appellant asked "I cannot ask [Young] to compare the two documents?" and the court responded, "No, no, no." *Id.* at 81. After Holloway asked the judge to explain her ruling, the judge obliged him, explaining yet again the prerequisite to his

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[2] The dissent speculates that Holloway embarked on this inquiry with the "hope[ ] that the jury would afford less credence to" the *Gerstein* affidavit for Rascoe if it were shown to be hearsay. See Dissent at 4. If Holloway indulged any such hope, he never revealed it—not in his dialogues with the court during the trial, not in his pre-sentencing hearing, and not in his briefs to this court. It would seem an odd mission, as no one had offered the *Gerstein* statement, so its "credence" was presumably zero. The closest Holloway could be said to suggesting such a purpose—and it is not very close at all—is a footnote in his Reply Brief at 15 n.5, where he alleges that the D.C. police often use hearsay statements in *Gerstein* affidavits to insulate arresting officers from cross examination. The procedure could not have had that effect here, as Truesdale prepared at least one PD 163 and Holloway used it in his cross-examination of Truesdale.

use of the document—"you must ask him if he has seen that document, not just those paragraphs contained on it". *Id.* at 82.

Appellant proceeded with his examination and asked Young "Do you know what that document is?" *Id.* at 83. Yet again Judge Johnson stepped in and informed Holloway that he was not heeding her directive, telling him that "we must determine if he's ever seen it before." *Id.* Judge Johnson then herself asked the witness whether he had ever seen the document before. After the witness said, "No, Ma'am", the judge reminded Holloway about the required threshold showings and their absence. *Id.*

Appellant doggedly persisted down the precluded path and asked again if the witness knew what the document was. As before, the judge intervened, this time pointedly telling Holloway "[i]f he has never seen it before, we are not going to ask him if he knows what it is." *Id.* at 84. Appellant then tried to avoid the clear import of the judge's statement, slyly asking Young, "Have you seen it now? Have you looked at it just now?" *Id.* Young said "Yeah, I see it now", and Holloway then asked Young, "Can you now tell us what... that document is?" *Id.*

After sustaining the prosecutor's objection, the judge laid down a clear warning: "This is the last time I'm going to tell you the objection is sustained." *Id.* Undeterred, appellant persisted in his effort to have Young look at the *Gerstein* statement and compare it with his PD 163, and asked Young whether he "recognize[d] any of the wording set forth in that document?" *Id.* At this point Judge Johnson held him in contempt. *Id.*

In challenging the conviction, appellant argues that "the terms of the district court's 'order' concerning the permissible scope of questioning on the Condit affidavit were unclear." Appellant's Brief at 37. A study of the transcript convinces us that Judge Johnson had made herself as clear as language permits. Through her repeated explanations, the questions *she* asked the witness, and her rulings in response to objections, the judge made it plain that she would not allow the witness to compare the wording in the documents unless it

were first established that the witness had seen the *Gerstein* affidavit before. Appellant and *amici* seek to interject some ambiguity into the judge's directions, but the record belies their Derrida-like efforts; Holloway's penultimate, disingenuous question—whether the witness had seen the documents "now"—makes clear that he knew what the judge meant. "To provide a defense to criminal contempt, [a] mistaken construction [of an order] must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible." *United States v. Greyhound Corp.*, 508 F.2d 529, 532 (7th Cir. 1974). Moreover, an alleged contemnor may not avoid an otherwise legitimate conviction "by 'twisted interpretations' or 'tortured constructions' of the provisions of the order." *Id.* (internal citations omitted). That is exactly what Holloway seeks to do here. In context, Judge Johnson clearly conveyed the message that she would not allow Young to be questioned about Condit's affidavit unless Young had seen the affidavit before.[3]

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[3] The dissent states that the judge was unclear because she told Holloway he could "proceed" with his questioning of Young after Young stated that he had never seen the document before and because Holloway "made clear to the judge that his primary reason for calling Officer Young ... was to ask him about the preparation of the PD-163 and the *Gerstein* affidavit." Dissent at 15. There are two problems with the dissent's theory. First, assuming arguendo that Holloway had indicated that his primary reason for calling Young was to inquire about the preparation of the documents, there was absolutely no reason for the judge to think Holloway might not wish to pursue other lines of inquiry. Holloway had already, for example, questioned Young for four pages of transcript on his role in the search. See Tr. 10/8 at 65–69. In any event, Judge Johnson's instruction to proceed is a rote direction used every day by both trial and appellate judges. Any litigant familiar with trial or appellate practice would understand that the judge was instructing Holloway either to go on to another line of questioning or, if he had no other line of questioning, to cease and allow the government to examine Officer Young on cross. There is no basis at all for assigning the phrase the dissent's proposed meaning—i.e., that Holloway could proceed with his questioning

Our review of the conviction under § 401(3) also requires us to decide whether a reasonable factfinder could have concluded beyond a reasonable doubt that the appellant disobeyed Judge Johnson's orders with culpable intent. Holloway's devious pretense that it would be enough if Young saw the document in court that very day (a theory that would make Judge Johnson's ruling completely meaningless) points strongly in the direction of willfulness. A "mere 'paper compliance' will support a finding of willfulness." *Greyhound*, 508 F.2d at 532. We need not, however, rest on the cited colloquy alone. Other episodes of Holloway's conduct in the *Rascoe* trial render the conclusion that he acted with culpable intent almost inescapable. See *Lumumba*, 794 F.2d at 811 (relying on non-cited conduct in the same trial as evidence of intent); *Farquhar*, 492 F.2d at 564 (similar).

The first of these occurred during a two-day pre-trial suppression hearing. Appellant was cross-examining Officer Condit in an effort to establish the defectiveness of a search warrant executed at a house where Rascoe lived; if the warrant were shown to be defective, Rascoe could have excluded crack cocaine that the police found in his hands when he was confronted during the search. Appellant's theory was that Condit knew the dwelling was a rooming house before applying for the warrant but nevertheless described the structure as a unitary dwelling in his affidavit. See Tr. 9/24 at 72–75. The witness repeatedly testified that he did not know it was a rooming house. The appellant persisted in his questioning and ultimately the judge sustained an objection and told him that he was "beating a dead horse." Tr. 9/24 at 75. The following disobedience of an explicit order then occurred:

> By Mr. Holloway:
>
> Q. After you entered the house [to execute the warrant] on March 8, you discovered, did you not, that, in fact, this

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about the document—as the judge had barred that in the immediately preceding colloquy.

was a rooming house divided up into separate rooms; right?

[The prosecutor]: Your Honor, I will object for the purpose of what they discovered on March 8 is irrelevant to this motion hearing.

The Court: What he discovered once he got in is irrelevant, and I will sustain the objection.

By Mr. Holloway:

Q. You now know, do you not, sir, that, in fact, that this residence is a rooming house?

The prosecutor: Objection, Your Honor.

The Court: Mr. Holloway, how many times do I have to tell you not to ask the question? Now, I just told you that that last question was inappropriate. You came back and asked the same question again.

Now, Mr. Holloway, you are an experienced attorney, very experienced attorney, and I would not like to have to hold you in contempt of Court for defying a direct order. Do not ever ask a question again that I have just ruled is inadmissible.

(Tr. 9/24 at 75–76.)

The next morning, prior to selection of the jury, Holloway moved to withdraw as counsel in the *Rascoe* case. Tr. 9/25 at 13–14. An exchange occurred between him and the judge (set out in full in Appendix B),[4] in which the judge made clear her insistence on obedience to her rulings. In denying the

[4] The quoted passage also alludes to allegedly contemptuous conduct of Holloway from a different trial that also took place before Judge Johnson and that immediately preceded the *Rascoe* trial. See *United States v. Farrell*, Crim. No. 90–0524 (D.D.C. tried September 17–23, 1991). We do not need to address the question whether a reviewing court may look at incidents from other trials to evaluate the contemnor's intent, as the incidents from the *Rascoe* trial dictate affirmance. We consider the quoted passage because it shows that appellant had been warned, not because it describes other incidents not in the record before us.

motion, she assured Holloway that he should have nothing to fear because she had not held anyone in contempt in her eighteen years as a judge. At the same time, however, she warned him at least three times (see emphases) that he would be expected to comply with her orders. Prior warnings are evidence of willfulness when they go unheeded. See *In re Niblack*, 476 F.2d 930, 932 (D.C. Cir. 1973).

A third incident involved the cross-examination of an expert witness, a chemist, who had analyzed narcotics found in Rascoe's bedroom. Counsel for one of Rascoe's co-defendants had sought and had obtained an *in limine* ruling prohibiting questions about a crack pipe that was seized at the same time as the cocaine and placed in the same evidence envelope. (No criminal charges were filed against Rascoe or any of his co-defendants relating to the pipe). After ruling in the codefendant's favor, the judge stated that "no one is going to mention that crack pipe that is in Exhibit No. 11 [the evidence envelope]". Tr. 10/3 at 11; see also *id.* at 17–18. Holloway told the court that he intended to introduce evidence about the crack pipe in Rascoe's defense case, and the judge informed Holloway that that was permissible. *Id.* at 11. Holloway later sought a further clarification of the court's ruling, asking the judge if she "would prohibit any cross-examination as to any other items [*i.e.*, the crack pipe] that would be in the [evidence envelope]?" Judge Johnson responded, "Most assuredly, because there was nothing on direct about it." *Id.* at 20.

During his cross-examination, Holloway took the envelope containing the pipe and asked the chemist if there was any "residue in that item." *Id.* at 48. Both the defense attorney who won the *in limine* ruling and the prosecutor objected, and, after sustaining the objections, Judge Johnson called Holloway to the bench and asked him why he had asked his question. After hearing the explanation, Judge Johnson found that appellant had been "determined to avoid following a direct instruction of the court", that he had asked the question about the pipes even though she had told him he "should not ask any such questions about those pipes", and that "there is no way you misunderstood me." *Id.* at 50–51.

After reviewing the cited colloquy, the episodes of prior disobedience and the judge's explicit warnings, we find that a reasonable trier of fact could have concluded beyond a reasonable doubt that Holloway "willful[ly] disregard[ed] or disobe[yed]" Judge Johnson's orders about the permissible scope of examination of Officer Young. *Farquhar*, 492 F.2d at 564; accord *Sykes v. United States*, 444 F.2d 928, 930 (D.C. Cir. 1971). Therefore all of the elements of a § 401(3) offense could properly be found.

Use of Summary\Contempt Procedure

Appellant also alleges that it was improper for the presiding judge to employ the summary procedures of Fed. R. Crim. P. Rule 42(a) instead of the notice and hearing procedures of Rule 42(b).[5] He is mistaken.

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[5] Fed. R. Crim. P. 42 provides:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Appellant does not dispute that Judge Johnson "saw or heard the conduct constituting the [cited] contempt" and that the con-

A judge unquestionably has the "power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him." *Taylor v. Hayes*, 418 U.S. 488, 497 (1974) (citing *Ex parte Terry*, 128 U.S. 289 (1888)). When a judge invokes that power, we review the decision that summary procedures were necessary very deferentially—for abuse of discretion. See *United States v. Meyer*, 462 F.2d 827, 843 (D.C. Cir. 1972).

Judge Johnson unquestionably was on solid ground in determining that the necessity of preserving order justified use of Rule 42(a). By the time the judge actually held Holloway in contempt, she had repeatedly warned him—without any apparent effect—to heed her rulings on pain of potential contempt. In the line of questioning that produced the contempt conviction, she at least three times reiterated her order about the threshold showing required to inquire about the *Gerstein* affidavit, and warned Holloway in open court that his continued inquiries violated the order. By the time Judge Johnson moved under Rule 42(a), she had a compelling need to terminate the improper questioning of Young, to deter future intentional violations of her orders, and to vindicate judicial authority to control the courtroom.

As appellant correctly notes, precedent reflects the "principle that only '[t]he least possible power adequate to the end proposed' should be used in contempt cases." *United States v. Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson v. Dunn*, 19 U.S. 204, 231 (1821)). During the course of the trial, however, appellant repeatedly had been told that certain lines of questioning were impermissible and also that failure to comply with orders could lead to contempt. None of this worked. Moreover, in the line of questioning that led to the conviction, Judge Johnson tried a variety of less drastic measures before holding appellant in contempt—explaining the basis for her ruling and reiterating the order, intervening to conduct the critical questioning herself, issuing another,

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duct was committed in the "actual presence of the court" as required by Rule 42(a).

more pointed, warning, and finally saying, "Mr. Holloway, this is the last time I'm going to tell you the objection is sustained." Tr. 10/8 at 84. Only then did the judge hold appellant in summary contempt. Given her heroic efforts to win compliance, one is hard pressed to see what lesser remedy she could reasonably have employed. The record certainly gives no basis for thinking that more orders, warnings, or threats would have produced improvement.

Finally, Holloway claims that the interest in a "fair and impartial assessment of the charges" required Judge Johnson to forego Rule 42(a)'s summary procedures and to refer the matter to another judge. The cases indeed bar the use of summary contempt procedures when alleged misconduct is of "such a personal nature" as to create actual or likely "embroilment" between the judge and alleged contemnor, or where "the judge adopts an adversary posture with respect to the alleged contemnor, even if he has not been personally attacked." *United States v. Meyer*, 462 F.2d 827, 841 (D.C. Cir. 1972); accord *Taylor v. Hayes*, 418 U.S. 488, 501, 503 (1974). Neither is present here. Holloway made no personal attacks on the judge. Compare *Mayberry v. Pennsylvania*, 400 U.S. 455, 456, 458 (1971) (contempt could not be tried by presiding judge after alleged contemnor in open court called the judge, *inter alia*, a "dirty sonofabitch," and told him to "[g]o to hell"). Nor is there any evidence that Judge Johnson adopted an adversary posture with respect to the appellant—unless we treat as such her insistence on remaining in charge. But to do so would seem to rule out summary contempt across the board, which Rule 42 plainly does not contemplate.

Propriety of the Sentence

Finally, appellant claims that Judge Johnson's sentence on the contempt conviction—a $1,000 fine—was excessive.[6] We

[6] Appellant does not challenge the propriety of the district judge's order barring him from appearing in her courtroom. Compare Dissent at 19 (discussing propriety of the bar). See Appellant's Brief at 2 (presenting statement of issues), 46–47 (discussing the order solely when arguing that appellant should have been tried by

review a criminal contempt sentence for "abuse of discretion", *Green v. United States*, 356 U.S. 165, 188 (1958), but with a direct power to revise. Noting that Congress had imposed no specific limit on contempt punishments, Justice Harlan wrote in *Green* that "[a]ppellate courts have ... a special responsibility for determining that the [contempt] power is not abused, to be exercised if necessary by revising themselves the sentences imposed." *Id.* When assessing the propriety of a sentence, this court considers factors such as "the necessity of achieving compliance with the court's order, the gravity of the offense, ... the importance of deterring such acts in the future," and "the financial resources of the offending party." *Drivers, Chauffeurs and Helpers Local No. 639 v. Penello*, 420 F.2d 632, 634 (D.C. Cir. 1969).

After considering those factors, we do not find the fine excessive. First, we are unpersuaded by Holloway's argument that because he obeyed after being held in contempt (and evidently engaged in no further misconduct thereafter), and because Judge Johnson did not actually impose the fine until months after the event, we may infer that a $1,000 fine was unnecessary to gain compliance with the order. Such an argument is nonsense; as soon as Judge Johnson held Holloway in contempt, he was on notice that something would happen, possibly something quite drastic. If we reduce the fine to a trivial amount, future contemnors will face less of a hazard. Similarly, while we appreciate that as an assistant federal public defender Holloway does not earn a salary at the top of the range for lawyers, the fine cannot have a material deterrent effect if it is trivial. In addition, while the conduct at issue did not involve threats toward the judge or disrespectful conduct, it is nonetheless serious to ignore one's duty to "protect the processes of orderly trial, which is the supreme object of the lawyer's calling." *Offutt v. United States*, 348 U.S. 11, 13 (1954) (Frankfurter, J.) (quoting *Sacher v. United States*, 343 U.S. 1, 14 (1952)). Finally, we note that Holloway was no courtroom tyro: he has practiced

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another judge under Fed. R. Crim. P. 42(b)); Reply Brief at 17 (same).

for twelve years, and "has been engaged in the practice of federal criminal defense work exclusively for over ten (10) years" with Federal Defender Offices in Chicago, the Virgin Islands, and Washington, D.C. *Affidavit of James R. Holloway* at 2, filed with Motion to Vacate Conviction. During those years, appellant has "represented hundreds of criminal defendants." *Pre-Sentencing Statement of James R. Holloway*, Sent. Tr. 3/10/92 at 15. Given Holloway's willingness repeatedly to disregard the judge's orders, and thereby also to undermine the court's authority, we do not think it an abuse of discretion to assess punishment in the form of a $1,000 fine.

* * *

Appellant and *amici* have embellished their briefs with unexceptionable remarks about the critical role that an independent and unbowed bar plays in preserving the liberty that defines our nation and that we are sworn to protect. We agree. As the Supreme Court stated in *In re McConnell*:

> it is ... essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.

370 U.S. 230, 236 (1962).

Nonetheless, the advocate in our legal system is expected to abide by the rulings of the presiding judge. "[I]f the ruling is adverse, it is not counsel's right to resist it ... his right is only respectfully to preserve his point for appeal." *Sacher v. United States*, 343 U.S. 1, 9 (1952). Absent such a requirement, trials would wander down every by-way, no matter how impermissible, in a sprawling chaos that would render the adjudication close to random. In the long run, such chaos is hardly in the interests of defendants as a whole, much less in the interest of society.

The judgment of conviction and sentence are affirmed.

So ordered.

Appendix A

On October 8, 1991, during trial in *United States v. Rascoe*, the following colloquy occurred. It was cited in full by Judge Johnson as the basis for her contempt conviction of appellant James R. Holloway.

[Tr. 10/8, p. 77] Mr. Holloway: Judge, I would like to mark something that's in the file and show the witness something that's in the file.

The Court: No. You can tell me what you want from the file, and Mrs. Pacori will get it out, but you are not going to mark anything in that file.

Mr. Holloway: There's a paperclip where it is.

The Court: Tell me what you want.

Mr. Holloway: There's a paperclip where it is.

The Court: Pass me the file.

Mr. Holloway: There's a pink paperclip.

The Court: You'd better approach the bench.

(At the bench)

The Court: Why do you choose to show this to that officer?

Mr. Holloway: Judge, that is the statement of facts that he wrote on the 163 word-for-word. I'm going to show it to him and ask him to compare the statement in that document to the [Tr. 10/8, p. 78] statement of facts that he wrote on the 163 he compared, and to compare those two statements as to whether they are identical or not.

The Court: Well, this statement is sworn to on the 9th of March, 1991, and it is sworn to by Robert Condit. So, maybe Robert Condit chose to take that man's statement exactly. How can he tell us where Condit got this from? This thing—

Mr. Holloway: That was not my question. My only question would be to ask him to look at that and compare it to the statement that he prepared and to give us—to

give us his indication of whether th[illegible]tatement—how that statement compares to the statement that he wrote.

The Court: Totally irrelevant.

Mr. Holloway: It's very relevant, Judge. It's the foundation I'm laying for questions to Officer Condit as to that statement of facts and where it came from, and whether that statement represents the statement of facts that was prepared by this witness, and whether he got that statement of facts from the 163 statement of facts prepared by this witness. And Your Honor can look at them. I will bring the 163 up here so you can look at it.

The Court: You don't have to.

Mr. Holloway: They're identical. They're word-for-word, identical.

The Court: So?

[Tr. 10/8, p. 79] Mr. Holloway: In fact, it looks like it's been xeroxed, that the statement of facts from the 163 has been xeroxed onto this Gerstein statement of facts that was filed.

The Court: The what?

Mr. Holloway: Gerstein, G–E–R–S–T–E–I–N, the statement of facts that was filed in the Superior Court the following day.

The Court: But my point to you, Mr. Holloway, and I will repeat it again, that 163 is dated March 8, 1991, is it not?

Mr. Holloway: Yes.

The Court: All right. This statement is sworn to on the 9th of March, 1991.

Mr. Holloway: But it could have been prepared on the 8th, Judge. We can ask the witness if he knows. Just because it was sworn on the 9th—

The Court: Excuse me, Mr. Holloway. There is absolutely nothing on here that demonstrates that this wit-

ness, Mr. Young, has ever seen this particular document before. There is absolutely nothing.

Now, if you want to present it to him and ask him if he has ever seen this particular document before, and not its contents, but the document itself, I will permit you to do that. But because it may have the same contents, because in fact Condit may have just taken his 163 and xeroxed it to swear to it doesn't carry any more weight than that.

[Tr. 10/8, p. 80] Now, if you want to give this to this witness to determine whether he has ever seen this document before as opposed to these contents, I would think that that would be relevant. I will hear from you.

Mr. Christian: Your honor, I don't think he can cross examine this witness as to the contents provided in that document that is sworn to by, I believe, Officer Condit. He can show him, but other than cross-examining or questioning him about the contents, I don't think he should be permitted to.

The Court: As I said, I don't see its relevance. It appears improper to me.

Anybody else care to be heard?

Mr. Huebner: No, your Honor, thank you.

The Court: All right, As I said, I am always very particular about doing this. If there is ever to your knowledge again any document in the official court jacket that you might like to use, tell my clerk and we will see if we can arrange to xerox it for you, because I'm not going to let you bother with this. Nothing should be removed from this jacket save by the clerk of court, under the rules of court, all right. So, if you ever, ever need anything again, simply ask us and we will be happy to do it, okay.

You may pass that to Mrs. Pacori or you may use it as you see fit.

[Tr. 10/8, p. 81] Mr. Holloway: Thanks judge.

The Court: Pursuant to my instructions, of course. I guess I'd better tell you that.

Mr. Holloway: Judge, can I have it—can I have it removed?

The Court: No, you may not. No, sir, not now. No, sir.

Mr. Holloway: I can't have it marked either?

The Court: No.

Mr. Holloway: Can I have a copy made? Can I have a copy made?

The Court: We don't have time to do that now. You have it marked with that pink paperclip, and that's as much marking as you are going to do.

Mr. Holloway: I need to identify it for the record.

The Court: You will have to identify it by the fact that it's a March 19—a March 9, 1991, affidavit by Robert Condit. That's all you can do right now. Later today I can get Mrs. Pacori to do it but not now. That's it, Mr. Holloway.

Mr. Holloway: Is Your Honor—just clarification as to what I can ask or not ask.

The Court: I have already told you the limits.

Mr. Holloway: I cannot ask him to compare the two documents?

The Court: No, no, no.

[Tr. 10/8, p. 82] Mr. Holloway: Why is that improper, Judge?

The Court: If this man has never seen that document before—and that's why I told you you must ask him if he has seen that document, not just those paragraphs contained on it—then he can't testify to it.

Mr. Holloway: Well, can he look at it now? I mean, can he look at it now and compare it.

The Court: He may not compare it until you have made certain determinations, Mr. Holloway. And I don't know

how often I have to say that. That's the third time I have repeated it.

(In open court:)

The Court: Mr. Young, if you will come back now, please.

Why don't you use the pink—keep the pink paperclip on it so we can use that as an identifying mark.

By Mr. Holloway:

Q: Sir, I'm showing you a document entitled "United States v. Kelvin Rascoe." It is a document dated March 9, 1991.

Mr. Christian: Your Honor, he can identify it if he can recognize it.

The Court: He can say that. Go ahead.

By Mr. Holloway:

Q: It is a document dated March 9, 1991. It is signed by Robert W. Condit, and it has the number 91-0183 on it and it [Tr. 10/8, p. 83] has a pink paperclip. Would you look at this please.

The Court: He's asking you to look at it to determine whether or not you have ever seen that document before.

By Mr. Holloway:

Q: Have you had a chance to look at it?

A: Yes, I have.

Q: Okay. Do you know what that document is?

The Court: No, no, no. First of all, we just determine if he's ever seen it before. That's the first step.

Have you ever seen that document before now?

Mr. Holloway: Judge—

The Witness: No, ma'am.

Mr. Holloway: Judge, I would ask the Court to allow counsel to complete his examination.

The Court: Excuse me, Mr. Holloway. The purpose of our last bench conference in which I ruled on that legal question said that the first thing you just do is determine whether he has ever seen this document before, and his answer is no, he has not seen it before today.

Was not that your answer?

The Witness: Yes, ma'am.

The Court: You may proceed.

By Mr. Holloway:

Q: Do you know what that document is?

Mr. Christian: Objection, Your Honor.

[Tr. 10/8, p. 84] The Court: If he has never seen it before, we are not going to ask him if he knows what it is.

By Mr. Holloway:

Q. Have you seen it now? Have you looked at it just now?

A: Yeah, I see it now.

Q: Okay. Having looked at it now, can you now tell us what it is, what that document is?

Mr. Christian: Objection, Your Honor.

The Court: The objection is sustained. And, Mr. Holloway, this is the last time I'm going to tell you the objection is sustained.

By Mr. Holloway:

Q. Do you recognize any of the wording set forth in that document?

Mr. Christian: Objection, Your Honor.

The Court: Mr. Holloway, approach the bench, please.

(At the bench:)

The Court: Mr. Holloway, I hold you in summary contempt of this court and I shall sentence you at the conclusion of this trial. Ask another question—ask that question another way and I shall hold you in summary contempt again.

Mr. Holloway: Your Honor—

The Court: I have ruled.

Mr. Holloway: Your Honor—

[Tr. 10/8, p. 85] The Court: Let's proceed.

Mr. Holloway: May I make—

The Court: There is nothing for you to say after a ruling.

(In open court:)

The Court: Mr. Young, you may resume the witness stand.

Mr. Holloway: That's all I have, Your Honor. Thank you. Thank you, sir.

Appendix B

[Tr. 9/25, p. 33] By Mr. Holloway: [B]ecause of indications by the court that you would hold me in contempt, as you indicated yesterday, and having indicated on two previous occasions in the prior trial that just completed on Monday of this week, that I felt as though my effectiveness in representing Mr. Rascoe stood the good prospect of being diminished because of fear of a contempt citation in the course of my conduct in the course of this trial.

Your Honor indicated yesterday morning, after a question, that if—I don't recall Your Honor's exact words—if I asked another question that I think you had sustained objection to that you would hold me in contempt. It was my belief at the time that I had asked a different question, that I had not asked the question that Your Honor had sustained objection to, and I believe that I

had a good faith basis for asking the question and that it was incumbent upon me to try to get a response to a question that I had both a good faith basis to ask and a well-founded view of its relevance. Your Honor once again indicated the possibility of contempt. And [Tr. 9/25, p. 34] after that I really began to really search my own soul, if you will, as to my effectiveness, in that I do have and will have constantly in the back off my mind the prospect that Your Honor may see fit to cite me for contempt for some activity in the course of the trial and because of, as I said, on two previous occasions, your Honor had so indicated.

* * *

[Tr. 9/25, p. 35] I would like to say to the court that I do not intentionally violate any court orders, any of the orders of the court, that if Your Honor has indicated in the past[ ] that I have asked questions [ ] that I have asked questions more than once, I would just say to the court that I—it is often times hard for me to personally keep as good track as to where I am in my notes as I would want to, and I would also tell Your Honor that I'm a human being.

* * *

The Court: Mr. Holloway, there is nothing unusual about that and, God knows being a human being myself, you can rest assured. I know the frailties of humanity. So, you don't have to waste time on that.

* * *

[Tr. 9/25, p. 36] The Court: Thank you very much sir. [ ] Very well. Mr. Rascoe, you have heard this motion that has been filed by your attorney, and I have given him an opportunity to expound on what he had written, and I want you to know that you have no reason to fear that your attorney can represent you effectively. He represented very effectively the client in the previous case that he refers to. He is an attorney with eleven and a half years of experience. He is not a neophyte. He will be able to represent you as zealously as he can represent anyone else. He will only be found in con-

tempt of court if his conduct is contemptuous. All of us can be contemptuous from time to [Tr. 9/25, p. 37] time, and that is the only way that he or any other lawyer in this city will ever be found in contempt of court by me is if they are contemptuous. As long as Mr. Holloway is not contemptuous, he has not one thing to worry about, and he knows that. He knows what the law is with respect to contempt, and he knows that unless he behaves contemptuously, there is no possible way for him to be held in contempt of court.

I am sure that I have not held an attorney in contempt of court in over 18 years, because most lawyers, like Mr. Holloway, know how to conduct themselves. If Mr. Holloway did not know how to conduct himself, I'm sure he would not be an Assistant Federal Public Defender. I'm sure he would not even be in his position if he did not know how to conduct himself.

But, Mr. Holloway did, unfortunately, forget himself one day last week. After asking him five times to be seated and his refusal to move, I had to do something. I could not proceed. I couldn't bring my jury into the court room because he refused to move. So, if he were to do that in here today during your case and I asked him to please be seated, I've got to move on, and he refuses a direct order and certainly not one that said stand on your head, Mr. Holloway, for ten minutes, simply would you please take your seat so that I can bring the jury in, then, yes, that is what is known as contempt of court. That is known as contemptuous conduct.

[Tr. 9/25, p. 38] I have every reason to believe that since Mr. Holloway engaged in that contemptuous conduct that day and I chose not to hold him in contempt of court, because I know how it hurts an attorney if he is held in contempt of court, that is no reason for him to bear being held in contempt of court. All he has to do is not engage in contemptuous conduct, because, you see, Mr. Holloway, I could have held you in summary contempt right then and I could have locked you up right then. But I said to myself, there is something wrong

here. Let me give him a little extra time to recognize the error of his ways. Here a judge is asking him to be seated so that she can proceed with the trial and he refuses to. Let me give him a little time to think. And I had my clerk come back from the door where she was poised to open the door to let the jury in whenever I was able to bring the jury in and to call to ask that not the marshall who was sitting in my courtroom but another marshall come up. And I told you very distinctly, I said, "Now, Mr. Holloway, if you are still standing here when that marshall comes upstairs, I shall have to hold you in summary contempt of the court." You found a way to sit down.

So, it is not I, Mr. Holloway. I have no problems with you or anyone else, zealously representing the interests of your client, but I do have a responsibility myself to the effective administration of justice. It is not a matter of just the lawyer or just the prosecutor or the prosecutor and [Tr. 9/25, p. 39] the defense bar. All three of us must work together. *You have certain responsibilities. I have the responsibility to rule on certain issues, and when I rule on those issues, I expect all officers of the court, be they male, female, young or old, to comply with the rulings of the court.*

Your motion is denied. There is absolutely nothing inconsistent with your being able to represent Mr. Rascoe and your professional interest. *There's no reason for you to fear being held in contempt of court, because you will certainly be given full notice of it. I can't promise that I will give you as much notice as I gave you the day you refused to take your seat when I told you to be seated. I can't promise you I will give you that much notice again by calling downstairs and giving you time to think while the marshall came upstairs. I can't promise you I will do that again, but I can promise you that I have not held a lawyer in contempt in over 18 years, hope that I don't ever have to hold another lawyer in contempt, but I must perform my function as well. If you will remember your function and remember the court's function, there will be no problems. And it is so ordered.*

MIKVA, *Chief Judge*, dissenting:

This is a most troublesome case. A young public defender has been permanently tarnished by a summary contempt conviction for seeking to perform as an advocate exercising warm zeal in a criminal case. The trial judge, after an unrelated dispute in another case, and after denying Mr. Holloway's request to withdraw from this case, summarily held Mr. Holloway in contempt of court. The certified contempt charge cited Mr. Holloway for "posing questions which the court had already ruled impermissible." The majority commendably attaches a transcript of the pertinent colloquy between the trial judge and the advocate. I cannot peruse that transcript without being convinced that the messages of the trial judge were confusing and ambiguous. Nevertheless, the majority holds today that a public defender must resolve all doubts against his own client and shrink from his ethical duty to represent his client zealously and to the fullest extent under the law. If an attorney misunderstands a court's ruling, or misinterprets the limits imposed upon him by the court, he may be summarily convicted of criminal contempt, and jailed, fined, or both, simply for asking a question that was arguably within the ambiguous limits set by the court. I dissent.

I.

In April 1991, Mr. Holloway represented Kelvin Rascoe on a charge of possession with intent to distribute crack cocaine in a multi-defendant trial before Judge Norma Holloway Johnson. During the suppression hearing, Judge Johnson threatened Mr. Holloway with contempt when he attempted to rephrase a question that she had previously ruled was impermissible. The threat of contempt shocked Mr. Holloway, and led him to believe that his representation of Mr. Rascoe would be jeopardized by the judge's obvious inclination to resort to contempt for any minor infraction of her orders. It occurred to Mr. Holloway that perhaps the tension generated between himself and the judge in a previous trial had not yet subsided and was infecting their working relation-

ship. The next morning, before jury selection began, Mr. Holloway moved to withdraw as counsel for Mr. Rascoe. Mr. Holloway stated:

> [B]ecause of indications by the court that you would hold me in contempt, as you indicated yesterday, and having indicated on two previous occasions in the prior trial that just completed on Monday of this week, that I felt as though my effectiveness in representing Mr. Rascoe stood the good prospect of being diminished because of fear of a contempt citation in the course of my conduct in the course of this trial ...
>
> I would like to say to the court that I do not intentionally violate any court orders.... I would just say to the court that I—it is oftentimes hard for me to personally keep as good track as to where I am in my notes as I would want to, and I would also tell Your Honor that I'm a human being.

Judge Johnson refused to allow Mr. Holloway to withdraw as counsel. She explained to Mr. Rascoe that although Mr. Holloway "forgot himself one day last week" when he refused to move after she asked him to be seated, Mr. Holloway "knows what the law is with respect to contempt, and knows that unless he behaves contemptuously there is no possible way for him to be held in contempt of court."

A. *The Incident Giving Rise to the Contempt Conviction*

The evidence at trial showed that Mr. Rascoe was arrested with his five co-defendants on March 8, 1991, when police executed a search warrant at a two-story rowhouse which contained a quantity of crack cocaine. Mr. Rascoe was found in a bedroom on the second floor with his girlfriend, Tammy Felton. Mr. Rascoe's defense to the charge of possession with intent to distribute was that the drugs found in the bedroom were not his, but rather his girlfriend's, and that she possessed the drugs for her own personal use.

The government's case against Mr. Rascoe rested on the testimony of a single police officer, Edward Truesdale. Officer Truesdale testified that while executing the warrant, he

entered a second floor bedroom and saw Mr. Rascoe standing in front of a couch tossing numerous ziplock bags of crack cocaine. Other officers who entered the bedroom did not see Rascoe toss any objects. One of those officers, Bradley Belden, was on Officer Truesdale's heels as he burst through the bedroom door, but did not see Mr. Rascoe throw anything as they entered the room. According to Officer Belden, Mr. Rascoe was simply standing in front of the couch when the officers entered the room.

Shortly after Rascoe's arrest, Officer Truesdale gave an account of the circumstances of the arrest to a fellow officer, Officer Young, who typed the information onto an arrest form, commonly called a "PD–163." Officer Truesdale's statement was then photocopied and inserted onto a "*Gerstein* affidavit" which was sworn to by a third police officer, Officer Condit. *See Gerstein v. Pugh*, 420 U.S. 103 (1975) (requiring sworn evidence, which may contain hearsay, establishing probable cause). Neither Officer Young nor Officer Condit was present in the bedroom at the time of Mr. Rascoe's arrest, and neither officer had personal knowledge of the surrounding circumstances.

Because Officer Truesdale's testimony was the only evidence that linked Mr. Rascoe to actual physical possession of any drugs, Mr. Holloway believed it was critical to the government's case against his client. In an effort to lay a proper foundation for use of the PD–163 and the *Gerstein* affidavit to challenge Officer Truesdale's testimony, Mr. Holloway called Officer Young as an adverse witness in Rascoe's case-in-chief. Mr. Holloway sought to explain to the jury, through Officer Young's testimony, that the *Gerstein* affidavit constituted triple-level hearsay. Mr. Holloway had already attempted, earlier in the trial, to question Officer Truesdale about his statement recorded in the PD–163, but Judge Johnson cut off his line of questioning because Officer Truesdale was not the author of the document. By calling Officer Young to the stand, Mr. Holloway hoped to expose the questionable police practice where an arresting officer's statement is typed on to a PD–163 form by one officer, and then photocopied and sworn to by a third officer. Mr. Holloway

hoped that the jury would afford less credence to the statement of facts in the *Gerstein* affidavit if Officer Young admitted to the jury that the *Gerstein* affidavit, which was sworn to by Officer Condit, consisted entirely of hearsay, and was actually a photocopy of the PD–163 statement that Officer Young had prepared.

Before Mr. Holloway could commence his examination of Officer Young, Judge Johnson called him to the bench and asked him to explain the relevance of his line of questioning. Mr. Holloway told Judge Johnson that the PD–163 and the *Gerstein* affidavit were "word-for-word identical" and that he was attempting to lay a foundation for questioning Officer Condit, the officer who swore to the *Gerstein* affidavit. At this point, the following colloquy occurred:

> **The Court:** Excuse me, Mr. Holloway. There is absolutely nothing on [this affidavit] that demonstrates that this witness, Mr. Young, has ever seen this particular document before. There is absolutely nothing.
>
> Now, if you want to present it to him and ask him if he has ever seen this particular document before, and not its contents, but the document itself, I will permit you to do that. But because it may have the same contents, because in fact Condit may have just taken his 163 and xeroxed it, to swear to it doesn't carry any more weight than that.
>
> Now, if you want to give this to this witness to determine whether he has ever seen this document before as opposed to these contents, I would think that would be relevant. I will hear from you.
>
> **The Prosecutor:** Your Honor, I don't think he can cross-examine this witness as to the contents provided in that document that is sworn to by, I believe, Officer Condit. He can show him, but other than cross-examining or questioning him about the contents, I don't think he should be permitted to.
>
> **The Court:** As I said, I don't see its relevance. It appears improper to me.
>
> Anybody else care to be heard?

Other Defense Counsel: No, Your Honor. Thank you.

* * *

The court then gave several procedural instructions regarding the removal of the affidavit from the court jacket. Mr. Holloway asked if he could remove the document from the jacket and have it marked into evidence, but the court denied those requests. At the end of this discussion, Mr. Holloway asked for clarification of the court's earlier ruling.

Mr. Holloway: Is Your Honor—just clarification as to what I can ask or not ask.

The Court: I have already told you the limits.

Mr. Holloway: I cannot ask him to compare the two documents?

The Court: No, no, no.

Mr. Holloway: Why is that improper, Judge?

The Court: If this man has never seen that document before—and that's why I told you must ask him if he has seen that document, not just those paragraphs contained on it—then he can't testify to it.

Mr. Holloway: Well, can he look at it now? I mean, can he look at it now and compare it?

The Court: He may not compare it until you have made certain determinations, Mr. Holloway. And I don't know how often I have to say that. That's the third time I have repeated it.

(IN OPEN COURT:)

The Court: Mr. Young, if you will come back now, please. Why don't you use the pink—keep the pink paperclip on it so we can use that as an identifying mark.

By Mr. Holloway:

Q: Sir, I'm showing you a document entitled "United States v. Kelvin Rascoe." It is a document dated March 9, 1991.

The Prosecutor: Your Honor, he can identify it if he can recognize it.

The Court: He can say that. Go ahead.

By Mr. Holloway:

Q: It is a document dated March 9, 1991. It is signed by Robert W. Condit, and it has the number 91–0183 on it, and it has a pink paperclip. Would you look at this, please.

The Court: He's asking you to look at it to determine whether or not you have ever seen that document before.

By Mr. Holloway:

Q: Have you had a chance to look at it?

A: Yes, I have

Q: Okay. Do you know what that document is?

The Court: No, no, no. First of all, we must determine if he's ever seen it before. That's the first step.

Have you ever seen that document before now?

Mr. Holloway: Judge—

The Witness: No, ma'am.

Mr. Holloway: Judge, I would ask the Court to allow counsel to complete his examination.

The Court: Excuse me, Mr. Holloway. The purpose of our last bench conference in which I ruled on that legal question said that the first thing you must do is determine whether he has ever seen this document before, and his answer is no, he has not seen it before today.

Was not that your answer?

The Witness: Yes, ma'am.

The Court: You may proceed.

By Mr. Holloway:

Q: Do you know what that document is?

Mr. Christian: Objection, Your Honor.

The Court: If he has never seen it before, we are not going to ask him if he knows what it is.

By Mr. Holloway:

Q: Have you seen it now? Have you looked at it just now?

A: Yeah, I see it now.

Q: Okay. Having looked at it now, can you now tell us what it is, what that document is?

The Prosecutor: Objection, Your Honor.

The Court: The objection is sustained. And, Mr. Holloway, this is the last time I'm going to tell you the objection is sustained.

By Mr. Holloway:

Q: Do you recognize any of the wording set forth in that document?

The Prosecutor: Objection, Your Honor.

The Court: Mr. Holloway, approach the bench, please.

(AT THE BENCH:)

The Court: Mr. Holloway, I hold you in summary contempt of this Court and I shall sentence you at the conclusion of this trial. Ask another question—ask that question another way and I shall hold you in summary contempt again.

Mr. Holloway: Your Honor—

The Court: I have ruled.

Mr. Holloway: Your Honor—

The Court: Let's proceed.

Mr. Holloway: May I make—

The Court: There is nothing for you to say after a ruling.

B. *The Contempt Certificate and Sentencing*

On the same day as the incident described above, Judge Johnson issued a written order summarily adjudging Mr. Holloway in contempt of court. In the contempt certificate, the district court described its version of the events leading up to the contempt adjudication. The court's version is different from the transcript of record in significant respects,

as it omits the numerous ambiguities in the exchange and portrays her directions as much clearer than they actually were. The court summarized the charge against Mr. Holloway as follows:

> "Holloway attempted three times to pose a question to the witness as to the contents of the document, when the Court had, at the prior bench conference, made it abundantly clear that such questioning was improper. In defiance of the Court's explicit order not to pursue a particular line of questioning, Holloway contumaciously persisted in posing questions which the Court had already ruled impermissible.

The court further stated that the contempt "caused serious and substantial interference and delay in the proceedings ... and obstruction to the orderly administration of justice."

At the conclusion of the trial, Judge Johnson advised Mr. Holloway that he was no longer allowed to appear in her courtroom other than in connection with this case. Thereafter, Judge Johnson communicated this order to Mr. Holloway's supervisor, A.J. Kramer, the Federal Public Defender.

Mr. Holloway moved to vacate the contempt citation as well as the order barring him from appearing in Judge Johnson's courtroom. Mr. Holloway also requested that Judge Johnson refer the proceedings to another district judge. In an affidavit attached to his motion, Mr. Holloway explained that his questions were meant to establish a foundation for challenging Officer Truesdale's trial testimony, and that he did not understand the court to have prohibited all further questions about the *Gerstein* affidavit, or to have precluded all attempts to establish that Officer Young was the author of the narrative portion of the *Gerstein* affidavit which was sworn to by Officer Condit. Mr. Holloway further suggested that because the court had allowed Officer Young to examine the document, and to respond to the question whether he had seen the document "now," Mr. Holloway believed that he was permitted to inquire whether Officer Young recognized the document's wording. Mr. Holloway emphasized that he "never would knowingly or deliberately impede or obstruct the or-

derly administration of justice of any court," and that he "never intended to engage in contumacious conduct in the course of his examination of Officer Young."

On March 10, 1992, immediately prior to pronouncing sentence, Judge Johnson denied Mr. Holloway's post-conviction motion on the grounds that the merits of the underlying contempt adjudication were not properly before the court at sentencing. Judge Johnson added, however, that she found "incredible" Mr. Holloway's assertion "that he did not understand the scope of the court's orders regarding permissible questions." Judge Johnson also denied his request for recusal because summary contempt was not entered against Mr. Holloway "out of any personal animosity." Judge Johnson did not address, however, Mr. Holloway's request that she vacate her directive permanently barring him from appearing in her courtroom.

Before sentence was imposed, Mr. Holloway expressed remorse over the incident and reiterated that he simply did not understand what limits the court had imposed on his questioning of the witness. Judge Johnson imposed a $1000 fine which has been stayed pending appeal.

II.

The circumstances described in the contempt certificate do not warrant a summary contempt conviction. What occurred between Mr. Holloway and Judge Johnson was quite typical of the frequently murky and unproductive exchanges that characterize so much of trial practice. Every day, lawyers banter with judges, argue with opposing counsel, raise objections, and creatively maneuver within court orders and commands. The arguments advanced by attorneys and the orders delivered from the bench are often spontaneous and reflexive; unlike the considered arguments presented in briefs on appeal, trial attorneys are required to think on their feet, respond deftly to apparent obstacles to their clients' cause, and press forward with their clients' interests uppermost in their mind. Indeed, trial attorneys are ethically obligated to argue with the court, to challenge its actions, and

to attempt to change its mind. These duties inevitably create tremendous conflict and tension between the court and counsel, and misunderstandings borne of impatience and frustration are commonplace.

Nevertheless, we have adopted this adversarial system as our own, and have entrusted to it the liberty of individuals whose fate rests in no small part on the efforts of their attorney before the court. In fact, we rely upon the aggressive conflict inherent in our adversary system to produce "just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The theory is that only by providing counsel the right "to press his claim, even if it appears farfetched and untenable," *Sacher v. United States*, 343 U.S. 1, 9 (1952), can we feel confident that the public interest has been advanced in both truth and fairness. *See Polk County v. Dodson*, 454 U.S. 312, 318 (1981).

In light of the interests at stake in our adversarial system, it incumbent upon courts to distinguish between courtroom conduct that we merely do not want to encourage, and that which merits a criminal sanction. This is especially so in the area of criminal contempt. Nowhere in our political system can an individual exercise unilateral authority comparable to that of a judge summarily convicting someone of criminal contempt. By finding someone guilty of contempt and ordering that person jailed, fined or both, a court combines the roles of grand jury, prosecutor, and judge, almost with impunity. There is no notice, no right to be heard, no right to a jury—virtually no due process at all—for an attorney summarily held in contempt of court.

Appellate courts have not been blind to the inherent dangers of the summary contempt power. Quite to the contrary, appellate courts have sought to limit use of the contempt power in light of its capacity for "grave abuse." *In re Oliver*, 333 U.S. 257, 274 (1948). The Supreme Court has made clear that "before the drastic procedures of summary contempt power may be invoked ... there must be an actual obstruction of justice." *In Re McConnell*, 370 U.S. 230, 234 (1962). And even where there is a threat of actual obstruction, courts

are limited to "the least possible power adequate to the end proposed." *United States v. Wilson*, 421 U.S. 309, 319 (1975), quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). Where obstruction of justice is not imminent, the court is bound to follow the "normal procedure" articulated in Rule 42(b), which calls for disposition only after notice and hearing. *Harris v. United States*, 382 U.S. 162, 165 (1965). In other words, a court's summary contempt power should be invoked only as a last resort.

A. *Obstruction of Justice*

There is no evidence on the record that Mr. Holloway's questioning of Officer Young actually obstructed justice. *See In Re Brown*, 454 F.2d 999, 1005 (D.C. Cir. 1971) ("actual, not theoretical obstruction is the test, and [ ] any claimed obstruction must be proven precisely"). Judge Johnson does not even attempt to explain how Mr. Holloway's questions obstructed the business of the court other than to make the conclusory statement that "the above-described conduct ... caused serious and substantial interference and delay in the proceedings." This claim strikes me as implausible, since the government concedes that Mr. Holloway did not raise his voice or treat the judge with disrespect, and the entire incident covers two pages of the transcript and probably consumed less than a minute. As stated by the Supreme Court in *In Re McConnell*,

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of judicial duty.

In Re McConnell, 370 U.S. at 236.

In *In Re McConnell*, a lawyer had been repeatedly ordered to refrain from a certain line of questioning to the witness. The lawyer, after continued persistence and a warning from the judge, indicated that he would not refrain from the questioning "unless some bailiff stops us." *Id.* at 235. At this point, a bailiff was called and the lawyer never returned

to the forbidden question. The Supreme Court reversed the attorney's conviction because it had not been "clearly shown" that "an actual obstruction of justice" occurred. *Id.*

Surely, the conduct in this case no more warrants a criminal conviction than that in *McConnell.* By the same token, other appellate courts have declined to find obstruction in cases involving conduct far more egregious than that at issue here. In *United States ex rel. Robson v. Oliver,* 470 F.2d 10 (7th Cir. 1972), for example, the defense counsel "deliberately asked a provocative and inflammatory question, unfounded in evidence, which disrupted the trial," but the contempt conviction was reversed because the court could have simply "stricken [the remarks] from the record with an appropriate instruction to the jury." And in *United States v. Meyer,* 462 F.2d 827 (D.C.Cir), *on remand,* 346 F. Supp. 973, 975 (D.D.C. 1972), although the defense counsel addressed the court in an "insulting, derogatory and disrespectful" manner, and repeatedly resisted the court's instructions to cease argument and be seated, the government failed to establish actual obstruction of justice. *See also, United States v. Sopher,* 347 F.2d 415, 418 (7th Cir. 1965) (although defense counsel knowingly made material misstatements of fact in his closing argument, the government's prompt objection and the court's immediate ruling and comment remedied the situation, and therefore there was no clear showing that counsel "actually obstructed" the court's performance of judicial duty).

The reluctance of appellate courts to uphold contempt convictions where the evidence falls short of actual obstruction rests on the awareness that a less restrictive standard would necessarily chill desirable advocacy. If courts can hold attorneys in contempt every time their representation arguably exceeds the amorphous bounds of acceptable advocacy, some advocacy that is entirely beneficial to our judicial system inevitably will be deterred. *See* Louis S. Raveson, *Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy,* 65 Wash. L. Rev. 743 (1990).

B. *Willfulness and Contumacious Intent*

One of the effective means of safeguarding beneficial advocacy which has, until now, been steadfastly enforced by this Court, is the requirement that the contempt certificate must set forth facts which establish a finding of willfulness and contumacious intent beyond a reasonable doubt. *See, e.g., In Re Brown*, 454 F.2d at 1007 ("[k]nowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt"). This prudential requirement is aimed at insulating trial attorneys from contempt convictions at all times except when it is clearly established, beyond a reasonable doubt, that an attorney actually intended to flout the court's authority.

Since the aim of the intent requirement is to protect vigorous advocacy, an attorney's ethical obligation to zealously represent his clients must be factored into any determination of whether he possessed the requisite intent. Thus, it is well established in this circuit that "[g]ood faith pursuit of a plausible though mistaken alternative is antithetical to contumacious intent," *In Re Brown*, 454 F.2d at 1007, and "any ambiguity in the court's direction ... precludes the essential finding of willful and contumacious resistance to the court's authority." *See, e.g., Traub v. United States*, 232 F.2d 43, 47 (D.C. Cir. 1955). As explained by this Court in *In Re Brown*, before an individual may be punished for contempt for violating a court order, "the terms of such order should be clear and specific, and leave no doubt or uncertainty in the minds of those to whom it is addressed." *In Re Brown*, 454 F.2d at 1008 n. 49 (quoting *McFarland v. United States*, 295 F.2d 648, 650 (7th Cir. 1933).

Judge Johnson's directions to Mr. Holloway regarding what he was entitled to ask Officer Young can hardly be characterized as "clear and unequivocal." *Traub*, 232 F.2d at 47. It appears that even the prosecutor was unclear about what Mr. Holloway could ask the witness. After Judge Johnson issued her first set of instructions to Mr. Holloway regarding his questioning of Officer Young, the prosecutor replied:

> Your Honor, I don't think he can cross-examine this witness as to the contents provided in that document that

> is sworn to by, I believe, Officer Condit. He can show him, but other than cross-examining or questioning him about the contents, I don't think he should be permitted to.

Indeed, the whole exchange is muddled and confused. Even after a careful read of the transcript, it is still not apparent whether the court was simply prohibiting Mr. Holloway from comparing the two documents or something more.

Mr. Holloway, throughout his questioning of Officer Young, merely sought to have Officer Young acknowledge that he had provided the information which was contained in the *Gerstein* affidavit, that he had received that information from Officer Truesdale, and that a third officer, who was not present at the scene of the arrest, swore to its accuracy. That the process is convoluted is hardly the defendant's fault. Moreover, the fact that one officer is "swearing" to information that he does not know first hand is hardly a commendable practice. Yet, the practice is tolerated in our courts and the defendants must work with it.

When Judge Johnson initially provided Mr. Holloway with instructions regarding the scope of his preliminary examination of Officer Young, she stated that he could not ask Officer Young to compare the two documents until he had established whether the officer had seen the *Gerstein* affidavit before. Then, after a protracted conversation on a procedural matter, Mr. Holloway asked for clarification of the judge's earlier ruling. Judge Johnson then stated that Mr. Holloway had to make "certain determinations" before asking Officer Young to compare the two documents, but never specified what those determinations were. Of course, it could be assumed that the "certain determinations" simply involved asking Officer Young if he had ever seen the *Gerstein* affidavit before; however, that would not explain why the judge told Mr. Holloway he could "proceed" with his questioning of the witness about the document even after the witness stated that he had never seen it before. No doubt, Mr. Holloway was confused by the court's directions to him at that point. It would have been unreasonable for Mr. Holloway to interpret

"[y]ou may proceed" as an order to abandon his line of questioning, since Mr. Holloway made clear to the judge that his primary reason for calling Officer Young to the stand was to ask him about the preparation of the PD–163 and the *Gerstein* affidavit. If he was prohibited from further questioning about the document, his questioning of the witness would be over and there would be no reason to "proceed." Thus, Mr. Holloway reasonably assumed that there must be another way to approach the issue or make the "certain determinations" which were necessary to proceed with his examination. When he rephrased the question, and asked the officer if he had seen the document "now," no objection was made, and the court allowed him to continue. At this juncture, Mr. Holloway could only have believed that he had succeeded in finding a way to make the "certain determinations" despite the fact the witness had never seen the document before. Nevertheless, when Mr. Holloway asked his next question, the court summarily convicted him of contempt.

The danger in holding attorneys in contempt for violating orders that are vague, or susceptible to multiple interpretations, should be obvious. Any law or judicial order which requires people of "common intelligence [to] necessarily guess at its meaning and differ as to its application," violates due process. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). That the writer of this opinion, a member of the bar for over 40 years, remains confused about the specifics of Judge Johnson's holding may only be an indication of his thick headedness. But it may also indicate that the trial court's directive was less than crystal clear.

There are real consequences to upholding contempt convictions where the instructions from the trial court are even arguably ambiguous. Attorneys, wary of the perils of proceeding in the face of mixed messages and indefinite language, will begin to resolve all doubts against their client and "restrict[ ] their conduct to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (discussing the chilling effect of vague prohibitions on free speech). A lawyer who is fearful of crossing a line that is less than clear

to him cannot deliver the warm zeal that criminal defense attorneys must have for the process to function properly.

Amici in this case, the Criminal Law and Individual Rights Section of the District of Columbia Bar, the Public Defender Service for the District of Columbia, and the National Association of Criminal Defense Lawyers, support Mr. Holloway's appeal, and urge this Court to establish clear limits on the use of the summary contempt power so that attorneys will not be deterred from aggressive and vigorous advocacy on behalf of their clients. As *Amici* point out,

> [a]ttorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows. Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of the controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.

In Re Dellinger, 461 F.2d 389, 400 (7th Cir. 1972).

Amici argue that this Court should limit the trial court's summary contempt power by requiring a warning, a specific inquiry into counsel's intent, and the use of the least onerous alternative. Use of the least onerous alternative is, generally speaking, already a requirement for use of the summary contempt power. *See, e.g., In Re McConnell*, 370 U.S. at 233 (when dealing with contemptuous behavior courts should use the "least power possible" adequate to the end proposed). The other two suggestions, the requirement of a warning and a specific inquiry into counsel's intent, while not required by the language of the contempt statute or Rule 42(a), do make prudential sense. These limitations on the summary contempt power would help to define the boundaries of appropriate advocacy and insure trial attorneys that they would have

sufficient notice that their activity was considered contemptuous *before finding themselves convicted of a criminal offense.*

Interestingly, the majority suggests that Mr. Holloway received adequate notice because Judge Johnson "three times reiterated her order about the threshold showing required to inquire about the *Gerstein* affidavit." Maj. Op. at 13. Yet this "threshold showing" is precisely what was so unclear in Judge Johnson's orders. Certainly, the reiteration of ambiguous orders and the allowance of some, but not all, questions regarding the forbidden topic, can hardly constitute adequate notice. It would have taken but a few seconds for the court to clarify its order and explain the boundaries of permissible questioning regarding the document (if further questioning about the document was permissible at all). If there were no permissible questions after Officer Young denied seeing the document before, Judge Johnson could have prevented the confusion by simply instructing Mr. Holloway to cease his questioning of the witness. If there were permissible questions regarding the document at that point, Judge Johnson should have told Mr. Holloway what those questions were. Failure to undertake such prophylactic measures seriously undercuts the majority's claim that Judge Johnson exhibited "heroic efforts to win compliance" *see* Maj. Op. at 15, and lends substantial support to the view that Mr. Holloway was, at most, engaged in the "good faith pursuit of a plausible though mistaken alternative." *In Re Brown*, 454 F.2d at 1007.

The majority's efforts to infer contumacious intent from other incidents of allegedly contemptuous conduct in the record are also unpersuasive. As the majority itself concedes, a criminal contempt order "must stand or fall on the sufficiency of the specification of wrongdoing upon which it is based." *Tauber v. Gordon*, 350 F.2d 843 n.1 (3d Cir. 1955) (*en banc*). If the conviction of contempt is to be sustained, the conduct complained of in the certificate must, in itself, constitute contempt. *See Hallinan v. United States*, 182 F.2d 880, 882 (9th Cir. 1950), *cert. denied*, 351 U.S. 952 (1951). Where the actions described in the contempt certificate, taken alone, are insufficient to support a conviction for contempt,

the contempt conviction may *not* be saved by pointing to similar incidents of borderline, or even contemptuous, conduct in the record. *See Eaton v. City of Tulsa*, 415 U.S. 697, 699 (1974) (contempt conviction reversed where the use of an expletive by the defendant, by itself, did not constitute an imminent threat to the administration of justice, although there were similar discourteous responses made by the defendant during the trial which may have supported the contempt conviction if cited in the contempt certificate).

The district court did not refer to or even hint that the contempt conviction was related to any past instances of misconduct. Therefore, the majority's attempt to save Mr. Holloway's conviction by combing the record in search of any minor excess of advocacy, excesses that are inevitable in any trial as heated and drawn-out as this one was, is unacceptable. In any event, the examples used by the majority are not worthy of a summary contempt charge, however irritating they might prove to some trial judges. Judge Johnson, unlike the majority, exercised appropriate restraint in not relying on those other incidents to justify the summary contempt conviction.

The majority is right about one thing, however. The contempt conviction in this case is related to a prior instance of misconduct—misconduct that occurred in a previous trial. A casual perusal of the transcript reveals that the tension generated between Judge Johnson and Mr. Holloway in the previous trial had not yet dissipated when this trial began. Mr. Holloway acknowledged this fact during the suppression hearing, and requested to withdraw as counsel for Rascoe. He explained to the court that his fear of being held in contempt arbitrarily and unpredictably would inevitably jeopardize his client's interests. Judge Johnson denied his request to withdraw, indicating that he had nothing to fear because he could avoid a contempt citation so long as he did not behave "contemptuously." The denial of the request undoubtedly stemmed from the desire to proceed with the trial in a timely fashion. But it made more imperative the judge's need to manage the trial with special sensitivity to the risks involved. Unfortunately, Mr. Holloway's instincts were

correct; for doing no more than vigorously representing his client's interests in the face of an ambiguous ruling from the court, he was summarily convicted of criminal contempt.

Notably, Mr. Holloway was also barred from appearing in Judge Johnson's courtroom. This is no minor inconvenience. Mr. Holloway, an assistant public defender, is not some random attorney who wanders into our district court. His representations on behalf of indigent defendants take him daily into all the district courts. So for him, being held in criminal contempt and banished from Judge Johnson's courtroom is a serious interference with his capacity to perform.

If this case was truly about the circumstances cited in the contempt conviction, rather than the resentment which had been brewing between the judge and Mr. Holloway since the previous trial, the drastic action of barring Mr. Holloway from the courtroom and holding him in contempt would be baffling. But as it stands, it is obvious from the record that Mr. Holloway was punished not for violating a court order to refrain from a certain line of questioning, but was punished instead for a dispute that occurred in a previous trial. This use of the summary contempt power is clearly abusive, and may have interfered with Mr. Rascoe's right to receive a fundamentally fair trial from a fair and unbiased judge. *See generally, Walberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir.), *cert. denied*, 474 U.S. 1013 (1985). Certainly, Judge Johnson's decision to proceed with Rascoe's trial after holding Mr. Holloway in contempt is vulnerable to questions. After the contempt conviction, Judge Johnson's impatience with all the defense attorneys, but particularly Mr. Holloway, is clear from the record. While Judge Johnson's irritability may be understandable given this long and arduous trial, this Court should not excuse the unwarranted consequences of her indiscretion. Trial judges are human beings, and when they make mistakes their decisions should be reversed, even if we have sympathy for the strains of their occupation.

III.

Whether or not Mr. Holloway should have been held in contempt in the previous trial is an open question—and

clearly not adjudicable in this Court on the record before us. Regardless, the circumstances in this case do not warrant a summary contempt conviction. At the very least, Judge Johnson should have utilized the "normal" procedure for adjudicating charges of criminal contempt under Rule 42(b) and afforded Mr. Holloway an opportunity to respond to the charge and explain his conduct. The fact that Mr. Holloway failed to receive even this minimal level of due process suggests that substantial resentment remained between the judge and Mr. Holloway from the previous trial, and that Mr. Holloway's request to withdraw as counsel for Rascoe should have been granted.

With the benefit of hindsight and the luxury of cool reflection, it may be possible to divine Judge Johnson's intent and decipher her instructions. One may even conclude that Mr. Holloway's conduct was not exemplary. Still, Mr. Holloway was not even close to obstructing justice and his conduct was far from "exceptional." *See Harris*, 382 U.S. at 164 (summary contempt power should be reserved for "exceptional" circumstances). Lawyers, in the heat of a criminal trial, are not always as perceptive and sensitive to the boundaries of examination set by the trial judge as we would want them to be. Hopefully, they are educable and may mature in their perceptions and judgment. The lesson that we are teaching this young lawyer, however, is to quell his zeal in favor of placating an irritated judge. That is not a good result for the criminal justice system—nor a lesson worthy of our court's traditions.

United States Court of Appeals
For the District of Columbia Circuit
FILED SEP 24, 1993
Ron Garvin, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 92-3085 **SEPTEMBER TERM, 1993**
USDC CR 91-0183

IN RE:
James R. Holloway

BEFORE: Mikva, Chief Judge; Williams and Henderson, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, filed July 26, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

Chief Judge Mikva would grant the petition for rehearing.

United States Court of Appeals
For the District of Columbia Circuit
FILED SEP 24, 1993
Ron Garvin, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 92-3085 **SEPTEMBER TERM, 1993**
USDC CR 91-0183

IN RE:

James R. Holloway

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

O R D E R

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Mikva and Circuit Judge Wald would grant the suggestion.

FILED
OCT 8 1991
Clerk, U.S. District Court
District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
v.	:	Criminal Action No. 91-0183
KELVIN E. RASCOE, et al., Defendants.	:	

ORDER

Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, and upon the certificate attached hereto and the facts stated therein, which are made a part hereof to the same extent as though restated in full herein, it is this 8th day of October, 1991,

ORDERED that James R. Holloway, Counsel for defendant Kelvin E. Rascoe, be, and hereby is, summarily adjudged in contempt of this Court, and it is further

ORDERED that sentencing be, and hereby is, scheduled following the conclusion of the trial herein.

s/Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

FILED
OCT 8 1991
Clerk, U.S. District Court
District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. : Criminal Action No. 91-0183

KELVIN E. RASCOE, et al., :
Defendants. :

CONTEMPT CERTIFICATE PURSUANT TO RULE 42(A) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

This certificate is made pursuant to Federal Criminal Rule 42(a), which provides for summary disposition of criminal contempt. The undersigned certifies that she personally saw and heard all of the conduct referred to herein, and that said conduct was committed in her actual presence.

At proceedings in open court, commencing at 10:05 a.m. on October 8, 1991, the following was personally seen and heard by the Court. A transcript of the proceedings described herein (hereinafter "Tr.") is attached to this certificate.

James R. Holloway (hereinafter "Holloway"), counsel for defendant Kelvin E. Rascoe, upon direct examination of a defense witness, sought to show the witness a document filed in the official court jacket. The Court had Holloway approach the bench whereupon he was asked to explain his reasons for showing the witness the document at issue. Tr.

at 2. Holloway indicated that he wanted the witness to compare the document, a sworn statement of facts by a police officer who had testified for the prosecution, with a Form 163 statement of facts that the witness himself had prepared for the police. Tr. at 2. Holloway suggested that the two forms were identical, and that perhaps the police officer had xeroxed the witness' statement of facts in preparing his own statement of facts. Tr. at 3. The Court ruled this line of questioning totally irrelevant, Tr. at 3, reasoning that the fact that the police officer may have used the witness' statement to prepare his own statement was of no effect. Tr. at 4. The Court also noted that there was nothing in the police officer's sworn statement to indicate that the witness had ever seen that document before or would have any knowledge of it. Tr. at 4.

The Court advised Holloway that he could present the document to the witness for the *sole* purpose of determining whether or not the witness had ever seen it before, but reiterated that Holloway would not be permitted to question the witness as to the contents of the document, prior to his establishing that the witness had knowledge of the document. Tr. at 4. After asking counsel for the other defendants whether they wanted to be heard, the Court repeated its admonition to Holloway that the document could only be used "pursuant to my instructions." Tr. at 5. Before leaving the bench, Holloway asked once again whether he could ask the witness to compare the two documents. Tr. at 6. The Court once again denied his request and reaffirmed that Holloway could only ask if the witness had seen the document before and that he could *not* question the witness as to its contents. Tr. at 6, 7. Thus, at the time the bench conference was concluded, Holloway had been told three times that he could not ask the witness about the contents of the document.

Holloway thereupon continued his examination of the witness. He asked the witness to look at the document in question. Tr. at 7. He then asked the witness if he knew what the document was. Tr. at 7. The Court reminded Holloway that he must first determine if the witness had ever

seen the document and then posed that question to the witness herself. Tr. at 8. The witness denied having ever seen the document before. Tr. at 8. Holloway then repeated his previous question, whether the witness knew what the document was. Tr. at 8. Upon objection by the prosecution, the Court told Holloway the question was improper; since the witness had just denied knowledge of the document, he could have no knowledge as to its contents. Tr. at 8. Holloway then asked the witness if, based upon his recent review of the document, he knew what the document was. Tr. at 8. Again, upon objection, the Court ruled the question improper, as it once again attempted to get the witness to testify to the document's contents. Tr. at 9. A third attempt to rephrase the forbidden question was made by Holloway: he asked whether the witness recognized any of the wording in the document. Tr. at 9. At this point, the Court called Holloway to the bench and informed him that he was being held in summary contempt of court. Tr. at 9.

Holloway attempted three times to pose a question to the witness as to the contents of the document, when the Court had, at the prior bench conference, made it abundantly clear that such questioning was improper. In defiance of the Court's explicit order not to pursue a particular line of questioning, Holloway contumaciously persisted in posing questions which the Court had already ruled impermissible.

It is certified that the above-described conduct, all of which occurred in the actual presence of the Court and was personally seen and heard by the Court, involved contemptuous behavior, constituting a contempt of court by James R. Holloway, which contempt caused serious and substantial interference and delay in the proceedings in the above-entitled case and obstruction to the orderly administration of justice.

Dated at Washington, D.C., this 8th day of October, 1991.

s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America	:	Criminal No. 91-0183
	:	Washington, D.C.
v.	;	Courtroom No. 4
	:	
Kelvin E. Rascoe, Et. Al.,	:	Tuesday, Oct. 8, 1991 10:05 A.M.
Defendants.	:	

. . . . . .

FILED
OCT. 8 1991
Clerk, U.S. District Court
District of Columbia

EXCERPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE, AND A JURY

For the Government:	Erik P. Christian, Esq.
For Defendant Rascoe:	James R. Holloway, Esq.
For Defendant Logan:	Lawrence Huebner, Esq.
For Defendant Mc Fadden:	Abbe Jolles, Esq.
For Defendant Felton:	Paul Signet, Esq.
For Defendant Gaither:	Dennis Galarowicz, Esq.

For Defendant
Robinson: Daniel Mc Guan. Esq.

Official Court Reporter: Gloria I. Williams
(202) 289-4470)

Computer-Aided Transcription
of Stenotype Notes

EXCERPT OF PROCEEDINGS

MR. HOLLOWAY: Judge, I would like to mark something that's in the file and show the witness something that's in the file.

THE COURT: No. You can tell me what you want from the file, and Mrs. Pacori will get it out, but you are not going to mark anything in that file.

MR. HOLLOWAY: There's a paperclip where it is.

THE COURT; Tell me what you want.

MR. HOLLOWAY: There's a paperclip where it is.

THE COURT: Pass me the file.

MR. HOLLOWAY: There's a pink paperclip.

THE COURT: You'd better approach the bench.

(AT THE BENCH:)

THE COURT: Why do you choose to show this to that officer?

MR. HOLLOWAY: Judge, that is the statement of facts that he wrote on the 163 word-for-word. I'm going to show it to him and ask him to compare the statement in that document to the statement of facts that he wrote on the 163 that he compared, and to compare those two statements as to whether they are identical or not.

THE COURT: Well, this statement is sworn to on the 9th of March, 1991, and it is sworn to by Robert Condit. So, maybe Robert Condit chose to take that man's statement exactly. How can he tell us where Condit got this from? This thing —

MR. HOLLOWAY: That was not my question. My only question would be to ask him to look at that and compare it to the statement that he prepared and to give us — to give us his indication of whether this statement — how that statement compares to the statement that he wrote.

THE COURT: Totally irrelevant.

MR. HOLLOWAY: It's very relevant, Judge. It's the foundation I'm laying for questions to Officer Condit as to that statement of facts and where it came from, and whether that statement represents the statement of facts that was prepared by this witness, and whether he got that statement of facts from the 163 statement of facts prepared by this witness. And Your Honor can look at them. I will bring the 163 up here so you can look at it.

THE COURT: You don't have to.

MR. HOLLOWAY: They're identical. They're word-for-word, identical.

THE COURT: So?

MR. HOLLOWAY: In fact, it looks like it's been xeroxed, that the statement of facts from the 163 has been xeroxed onto this Gerstein statement of facts that was filed.

THE COURT: The what?

MR. HOLLOWAY: Gerstein, G-E-R-S-T-E-I-N, the Statement of Facts that was filed in the Superior Court the following day.

THE COURT: But my point to you, Mr. Holloway, and I will repeat it again, that 163 is dated March 8, 1991, is it not?

MR. HOLLOWAY: Yes.

THE COURT: All right. This statement is sworn to on the 9th of March, 1991.

MR. HOLLOWAY: But it could have been prepared on the 8th, Judge. We can ask the witness if he knows. Just because it was sworn on the 9th —

THE COURT: Excuse me, Mr. Holloway. There is absolutely nothing on here that demonstrates that this witness, Mr. Young, has ever seen this particular document before. There is absolutely nothing.

Now, if you want to present it to him and ask him if he has ever seen this particular document before, and not its contents, but the document itself, I will permit you to do that. But because it may have the same contents, because in fact Condit may have just taken his 163 and xeroxed it to swear to it doesn't carry anymore weight than that.

Now, if you want to give this to this witness to determine whether he has ever seen this document before as opposed to these contents, I would think that that would be relevant. I will hear from you.

MR. CHRISTIAN: Your Honor, I don't think he can cross-examine this witness as to the contents provided in that document that is sworn to by, I believe, Officer Condit. He can show him, but other than cross-examining or questioning him about the contents, I don't think he should be permitted to.

THE COURT: As I said, I don't see its relevance. It appears improper to me.

Anybody else care to be heard?

MR. HUEBNER: No, Your Honor. Thank you.

THE COURT: All right. As I said, I am always very particular about doing this. If there is ever to your knowledge again any document in the official Court jacket that you might like to use, tell my Clerk and we will see if we can arrange to xerox it for you, because I'm not going to let you bother with this. Nothing should be removed from this jacket save by the Clerk of Court, under the Rules of Court, all right. So, if you ever, ever need anything again, simply ask us and we will be happy to do it, okay.

You may pass that to Mrs. Pacori or you may use it as you see fit.

MR. HOLLOWAY: Thank Judge.

THE COURT: Pursuant to my instructions, of course, I guess I'd better tell you that.

MR. HOLLOWAY: Judge, can I have it — can I have it removed?

THE COURT: No, you may not. No, sir, not now. No, sir.

MR. HOLLOWAY: I can't have it marked either?

THE COURT: No.

MR. HOLLOWAY: Can I have a copy made? Can I have a copy made?

THE COURT: We don't have time to do that now. You have it marked with that pink paperclip, and that's as much marking as you are going to do.

MR. HOLLOWAY: I need to identify it for the record.

THE COURT: You will have to identify it by the fact that it's a March 19 — a March 9, 1991, affidavit by Robert Condit. That's all you can do right now. Later today I can get Mrs. Pacori to do it but not now. That's it, Mr. Holloway.

MR. HOLLOWAY: Is Your Honor — just clarification as to what I can ask or not ask.

THE COURT: I have already told you the limits.

MR. HOLLOWAY: I cannot ask him to compare the two documents?

THE COURT: No, No, No.

MR. HOLLOWAY: Why is that improper, Judge?

THE COURT: If this man has never seen that document before — and that's why I told you you must ask him if he has seen that document, not just those paragraphs contained on it — then he can't testify to it.

MR. HOLLOWAY: Well, can he look at it now? I mean, can he look at it now and compare it?

THE COURT: He may not compare it until you have made certain determinations, Mr. Holloway. And I don't know how often I have to say that. That's the third time I have repeated it.

(IN OPEN COURT:)

THE COURT: Mr. Young, if you will come back now, please.

Why don't you use the pink — keep the pink paperclip on it so we can use that as an identifying mark.

BY MR. HOLLOWAY:

Q Sir, I'm showing you a document entitled "United States v. Kelvin Rascoe." It is a document dated March 9, 1991.

MR. CHRISTIAN: Your Honor, he can identify it if he can recognize it.

THE COURT: He can say that. Go ahead.

BY MR. HOLLOWAY:

Q It is a document dated March 9, 1991. It is signed by Robert W. Condit, and it has the number 91-0183 on it, and it has a pink paperclip. Would you look at this please.

THE COURT: He's asking you to look at it to determine whether or not you have ever seen that document before.

BY MR. HOLLOWAY:

Q Have you had a chance to look at it?

A Yes, I have.

Q Okay. Do you know what that document is?

THE COURT: No, No, No. First of all, we must determine if he's ever seen it before. That's the first step.

Have you ever seen that document before now?

MR. HOLLOWAY: Judge —

THE WITNESS: No, Ma'am.

MR. HOLLOWAY: Judge, I would ask the Court to allow counsel to complete his examination.

THE COURT: Excuse me, Mr. Holloway. The purpose of our last bench conference in which I ruled on that legal question said that the first thing you must do is determine whether he has ever seen this document before, and his answer is no, he has not seen it before today.

Was not that your answer?

THE WITNESS: yes, Ma'am.

THE COURT: You may proceed.

BY MR. HOLLOWAY:

Q Do you know what that document is?

MR. CHRISTIAN: Objection, your honor.

THE COURT: If he has never seen it before, we are not going to ask him if he knows what it is.

BY MR. HOLLOWAY:

Q Have you seen it now? Have you looked at it just now?

A Yeah, I see it now.

Q Okay. Having looked at it now, can you now tell us what it is, what that document is?

MR. CHRISTIAN: Objection, Your Honor.

THE COURT: The objection is sustained. And, Mr. Holloway, this is the last time I'm going to tell you the objection is sustained.

BY MR. HOLLOWAY:

Q Do you recognize any of the wording set forth in that document?

MR. CHRISTIAN: Objection, Your Honor.

THE COURT: Mr. Holloway, approach the bench, please.

(AT THE BENCH:)

THE COURT: Mr. Holloway, I hold you in summary contempt of this Court and I shall sentence you at the

conclusion of this trial. Ask another question — ask that question another way and I shall hold you in summary contempt again.

MR. HOLLOWAY: Your Honor —

THE COURT: I have ruled.

MR. HOLLOWAY: Your honor —

THE COURT: Let's proceed.

MR. HOLLOWAY: May I make —

THE COURT: There is nothing for you to say after a ruling.

(IN OPEN COURT:)

THE COURT: Mr. Young, you may resume the witness stand.

MR. HOLLOWAY: That's all I have, Your Honor. Thank you.

Thank you, sir.

(END OF EXCERPT)

* * *

CERTIFICATE OF REPORTER

This record is certified by the undersigned reporter to be the official transcript of the excerpt of proceedings.

s/ Gloria I. Williams
Gloria I. Williams
Official Court Reporter